

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS
Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF:
WASHINGTON, D.C. SMSA LIMITED
PARTNERSHIP (d/b/a VERIZON WIRELESS)
and
WESLEY GROVE UNITED METHODIST
CHURCH

Petitioners

Robert Posilkin
Phillip Perrine
Luke Neiswander
Joseph Joyce
Curt Westergard
For the Petition

M. Gregg Diamond, Esquire

Attorney for Petitioners

*
*
*
*
*
*
*
*
*
*
*
*
*
*
*
*
*
*
*

Board of Appeals Case No. S-2706
(OZAH No. 08-1)

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

TABLE OF CONTENTS

	PAGE
I. STATEMENT OF THE CASE.....	2
II. FACTUAL BACKGROUND	5
A. The Subject Property and the General Neighborhood	5
B. Proposed Use.....	10
C. Impact of the Proposed Facility on the Neighborhood	18
D. Need for the Proposed Facility	26
E. The Master Plan.....	32
III. SUMMARY OF HEARING	33
IV. FINDINGS AND CONCLUSIONS	47
A. Standard for Evaluation	47
B. General Conditions.....	49
C. Specific Standards.....	54
D. Additional Applicable Standards	59
V. RECOMMENDATION	62

I. STATEMENT OF THE CASE

Petition No. S-2706, was filed on June 19, 2007, by Washington, D.C. SMSA Limited Partnership (d/b/a Verizon Wireless; hereinafter “Verizon”) and the Wesley Grove United Methodist Church (hereinafter, “the Church”), which owns the subject site. Petitioners seek a special exception, pursuant to §59-G-2.58 of the Zoning Ordinance, to permit construction of an unmanned, wireless telecommunications facility at 23630 Woodfield Road, Gaithersburg, Maryland. It would consist of an equipment area and an 80 foot tall monopole, with antennas and stealth tree branches extending the overall height to 87 feet. The subject site is in the RE-2 Zone, which permits telecommunications facilities by special exception. Verizon has a lease agreement (Ex. 12) to rent the subject site from Wesley Grove United Methodist Church for the proposed use. The Tax Account Number is 00941580. The tower would be a “stealth” facility, designed to look like a pine tree.

Initially, Petitioners had planned to locate the monopole close to an existing Sprint monopole, disguised as a flagpole on the Church’s land.¹ However, at that location, setbacks would not have been compliant with statutory requirements. Tr. 17. When the Transmission Facilities Coordinating Group (TFCG) initially reviewed that proposal in October of 2006, the TFCG asked Verizon to work with the Church to locate the monopole on the property so as to meet setback requirements; to lower the then-proposed height; and to disguise it with a tree design. Petitioners met these request, and on March 7, 2007, the TFCG voted to approve Petitioners’ proposal, subject to the granting of a special exception. Exhibit 24.

Petitioners thereafter filed the subject special exception petition, and it was scheduled for a hearing. Technical Staff at the Maryland-National Capital Park and Planning Commission, in a report issued October 31, 2007, recommended conditional approval of the special exception

¹ The Sprint Monopole did not have adequate space available at the minimum height needed by Verizon to add the additional Verizon facility within its flag monopole. Tr. 51.

(Exhibit 16).² One of the recommended conditions was that the location of the proposed monopole be approved by the Historic Preservation Commission (HPC). This recommended condition was based on the fact that the proposed telecommunications facility would be located on property that is within the Woodfield Historic District, though on its edge. The Planning Board, in a letter dated November 16, 2007, also unanimously recommended approval of the Petition, but deleted Staff's recommendation for a condition requiring HPC approval (Exhibit 17). The Planning Board felt that Petitioners had met the special exception requirements, and that it was up to the HPC to decide on whether to issue an historic area work permit (HAWP).

On November 14, 2007, the HPC denied Petitioners' application for a HAWP, on grounds that the property is an "Outstanding Resource in the Woodfield Historic District;" that the proposed monopole would not be compatible; that it would not meet certain federal standards for historic rehabilitation; that it would change the environmental setting of an Outstanding Resource; and that it would adversely affect the historic resource and the historic district.

Verizon appealed the HAWP denial to the Board of Appeals (BOA #A-6241). The special exception hearing was postponed twice at Petitioners' request pending resolution of the historic preservation issues. Exhibits 20 and 26. In a 20-page Opinion, effective January 9, 2009, the Board of Appeals reversed the HPC and held that the HAWP should be granted. Exhibit 33. The Board found that the proposed monopole would not adversely impact upon the "linear," historic, rural streetscape that the Woodfield Historic District sought to protect.

Given the Board's ruling on this issue in a case involving the same proposal, site, petitioners and adjudicative body as in the special exception application, the Hearing Examiner finds that the Board's decision is *res judicata* on the issue of historic compatibility (or more precisely, it collaterally estops the issue from being re-litigated in this parallel administrative case). Therefore,

² The Technical Staff report is frequently quoted and paraphrased herein.

this report will make no findings or recommendations in that regard. *Woodlawn Area Citizens Association, Inc. v. Bd. of County Commissioners for Prince George's County*, 241 Md. 187, 216 A.2d 149 (1966).³ Of course, other compatibility issues will be analyzed, as required by Zoning Ordinance Chapter 59-G.

A new notice was issued on November 19, 2008, for the special exception hearing, setting February 20, 2009, as the date for the hearing. Exhibit 31. That notice also gave notice of amendments to the application. Technical Staff indicated that it had reviewed the revised plans, and that Staff would make no additional comments. Exhibit 30.

The only opposition in this case is a letter dated February 16, 2009, from a citizen, Louis Manza (Exhibit 32), who lives about a third of a mile away from the site. Tr. 29. Mr. Manza expressed concern that the proposed monopole might be visible from his property. As discussed in Part II.C. of this report, it appears that the monopole will not be visible from Mr. Manza's home.

A public hearing was convened as scheduled on February 20, 2009, and Petitioners called five witnesses. There were no other participants at the hearing, which concluded on the same day. The record was held open until February 27, 2009, so that Petitioners could file some additional information and electronic copies of certain exhibits, and it closed on the specified date. It was reopened and closed on March 26, 2009, to receive a signed copy of previously filed Exhibit 10.⁴

As will appear more fully below, Petitioners have met all the requirements for the special

³ Concepts of *res judicata* and issue preclusion are not as neatly applied in administrative cases as they are in court cases. These doctrines do not prevent re-examination of an issue where an administrative body has made an error of law or where its decision was the product of fraud, surprise, mistake or inadvertence, or where conditions have substantially changed. *Board of County Comm'ers of Cecil County v. Racine*, 24 Md. App. 435, 332 A.2d 306 (1975); and *Klein .v. Colonial Pipeline Company*, 55 Md.App. 324, 462 A.2d 546 (1983). There is no indication that any of those factors played a part in the Board's decision in Case No. A-6241. While reasonable minds could differ on the question of whether the proposal would offend the historic district, the Board's decision that it would not was driven by its evaluation of the evidence, not by a legal interpretation. There is also no evidence that circumstances have changed since the Board's January 9, 2009 decision. Therefore, neither the Board nor the Hearing Examiner has any basis for re-examining the Board's determination of the historic preservation issue in Case No. A-6241.

⁴ No comment period was needed because the signed copy of the EMF Compliance Report (Exhibit 45(a)) contained the same information as was contained in the original EMF Compliance Report (Exhibit 10).

exception they seek, and the Hearing Examiner recommends that it be granted, with conditions specified in Part V of this report.

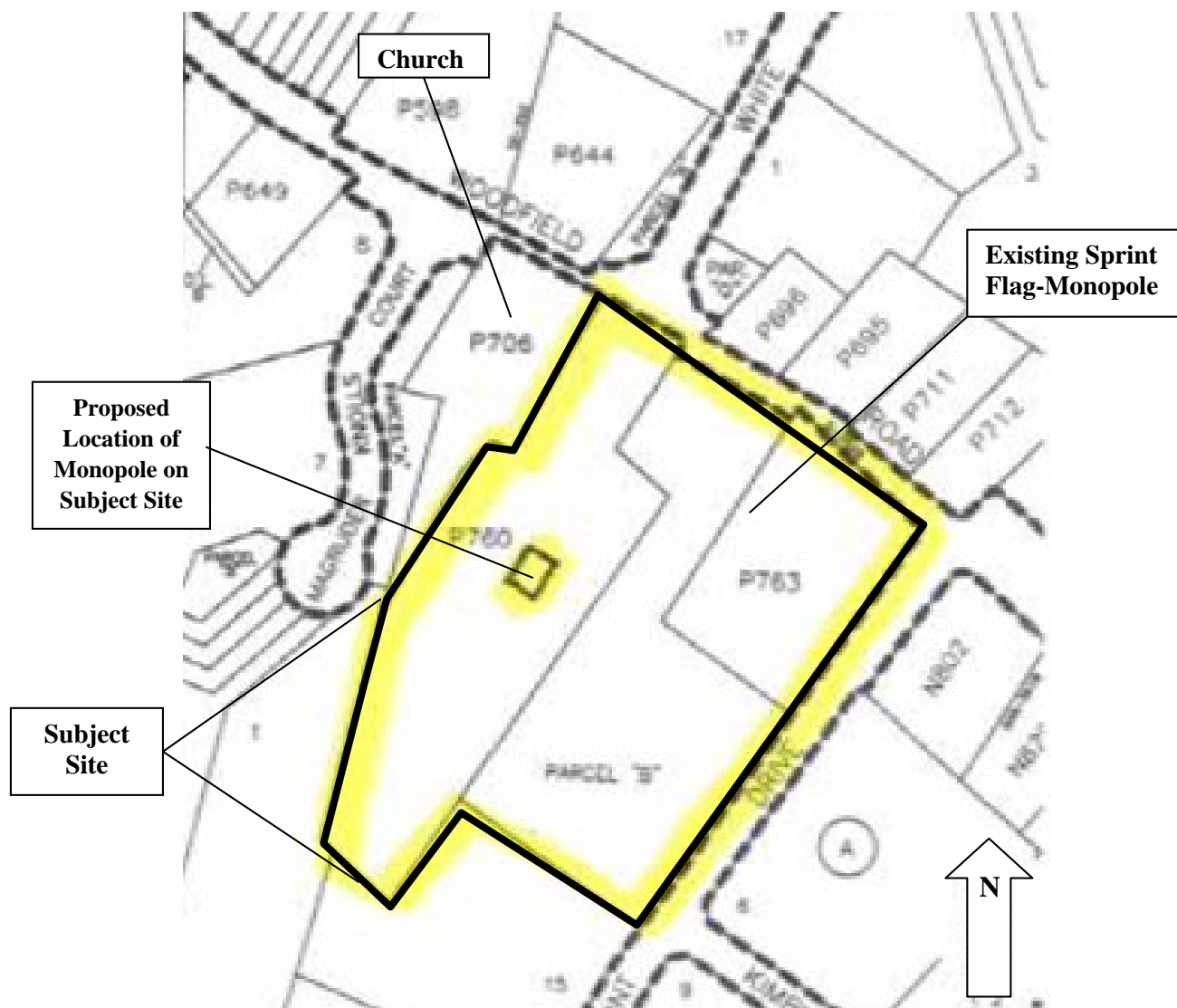
II. FACTUAL BACKGROUND

A. The Subject Property and the General Neighborhood

As noted above, the address of the subject property is 23630 Woodfield Road, Gaithersburg, Maryland. The subject site is zoned RE-2 and is located on the south side of Woodfield Road, just northwest of its intersection with Kimblehunt Drive, within the Damascus Master Plan Area. As described in Petitioners' Land Planning Report (Exhibit 7, pp. 1-2), the property consists of Parcel P760, P763, and Parcel B (Montgomery County Tax Map FW62), although the proposed monopole and equipment area will be restricted to Parcel P760. The immediate area can be seen on the following General Orientation Map, which is an aerial photo from Exhibit 8.



The parcels comprising the site are shown on the following Zoning Map attached to the Technical Staff report (Exhibit 16):



The site is 7.3 acres, with about 500 feet of frontage on Woodfield Road. It also has frontage on Kimblehunt Drive. According to Petitioners' Land Planning Report, the property is approximately 620 feet in depth and is developed with two single-family, detached residences, an educational building, a freestanding shed, a parking lot and driveway, a playground, a pavilion, a ball field, areas of lawn and trees, and shrubs surrounding the residences. There is also an existing 100-foot Sprint

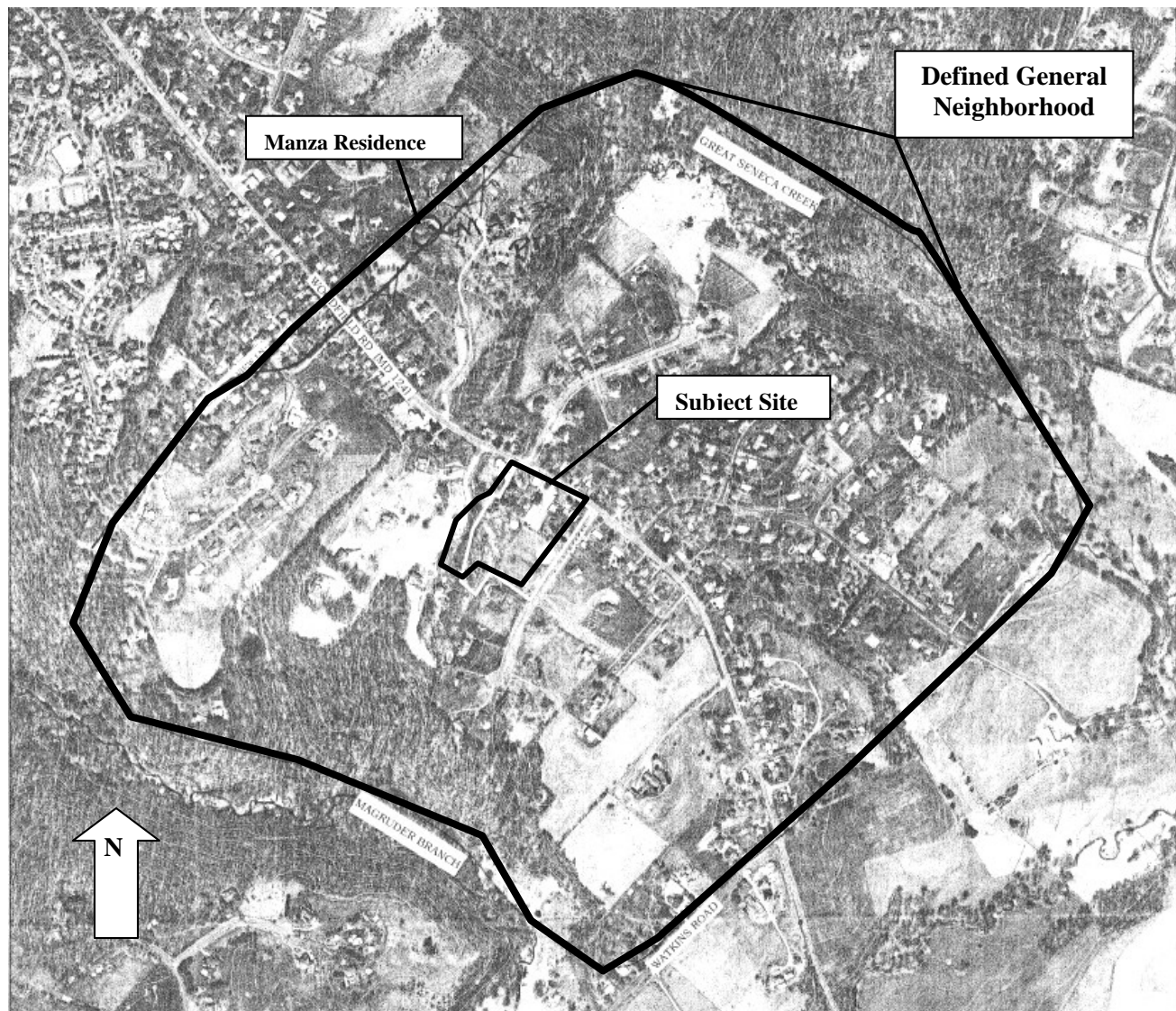
cell tower, disguised as a flagpole, located between the parking lot and the southern residence on Parcel P763. That facility is permitted under Special Exception S-2526, approved December 6, 2002.

The topography is gently sloping (5%) from west to east, the lowest point of the site being at the corner of Woodfield Road and Kimblehunt Drive. No streams, wetlands, steep slopes or rare and endangered species were found on the Property. There are approximately 2.80 acres of forest on site, and the proposed stealth monopole will be in the middle of the forested area. Access to the site is from Woodfield Road, a two-lane arterial road with a variable right-of-way. Two views of the site are shown below, from Exhibit 8:



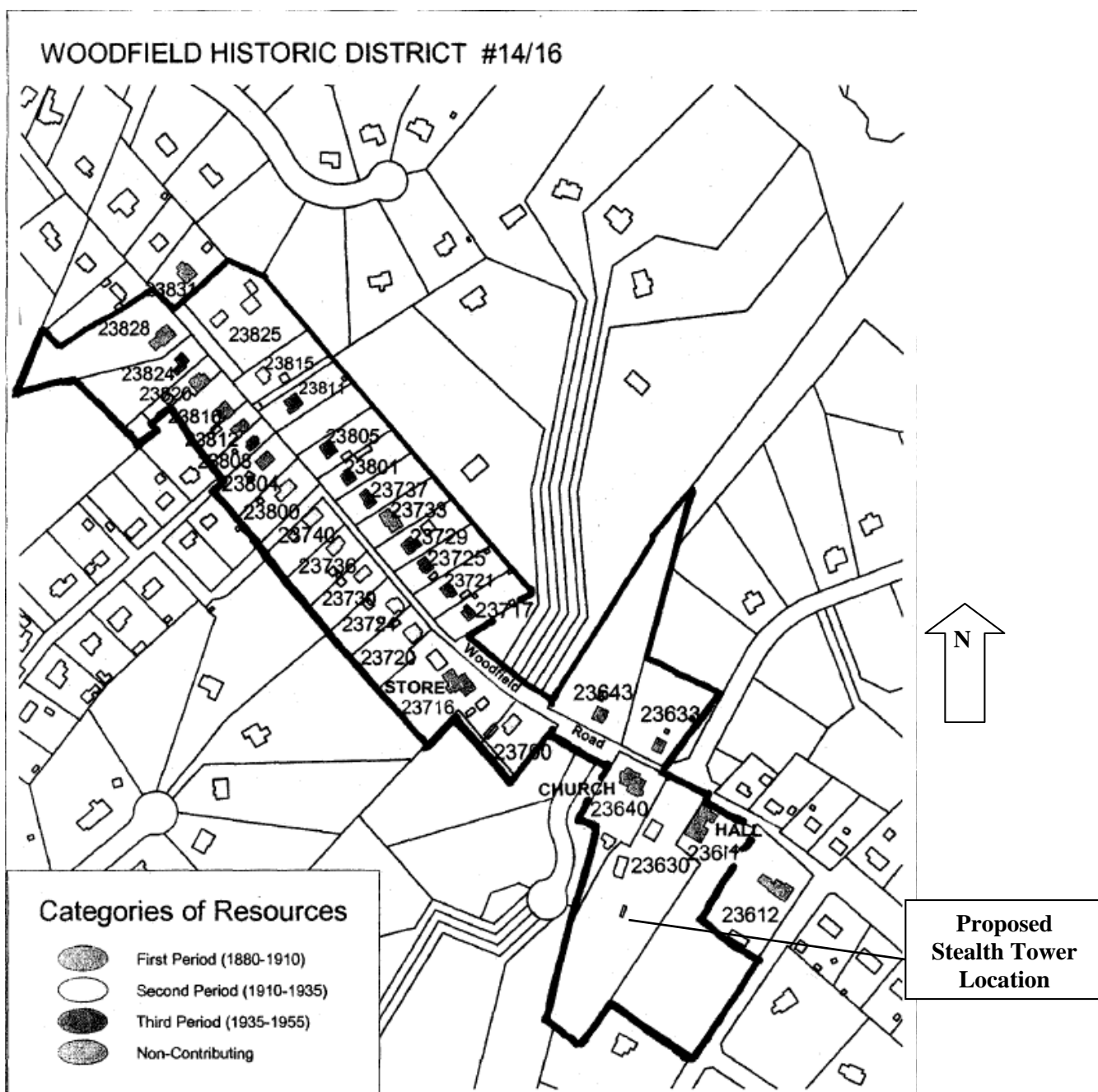
The Wesley Grove United Methodist Church also owns the adjoining property to the northwest, Parcel P706. That parcel is developed with a church, a cemetery and a small house.

Technical Staff defined the neighborhood within which the subject property is located as bounded by Seneca Stream Valley Park to the north and east, Watkins Road to the south and Pleasant View Lane to the west, as shown on the following Aerial photo (Exhibit 37):



Technical Staff reports that the subject site is surrounded by single-family detached homes. To the south, west and east of the property, single-family homes are located in the RE-2 zone.

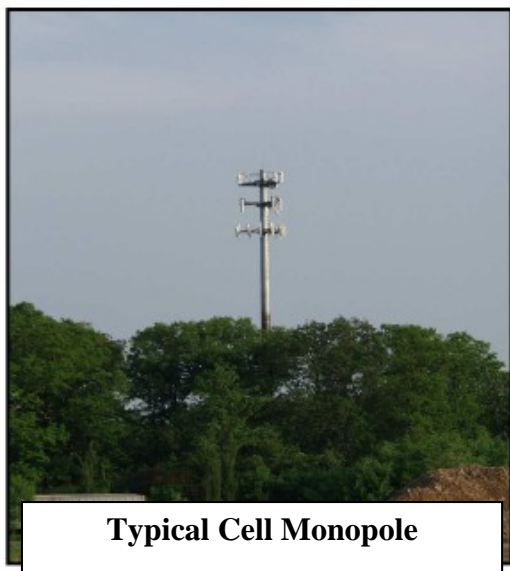
Single-family dwellings are also located across Woodfield Road in the RE-2C zone. There is a small commercial area about 600 feet northwest of the subject site, along Woodfield Road. The area is generally characterized as a linear community on either side of Woodfield Road. Petitioners' land use expert, Phil Perrine, accepted this definition of the neighborhood (Tr. 22), as does the Hearing Examiner, because it appears to describe the outer perimeter of any possible impacts from the proposed cell tower. The linear nature of the Woodfield Historic District, in which the subject site is located, is shown below (Exhibit 38):



As mentioned on page 3 of this report, compatibility with the historic district has already been established by the Board of Appeals Opinion in Case No. A-6241. There are only two other special exceptions in the defined neighborhood, the Sprint cell tower, which is also located on the subject site (S-2526) and an accessory apartment located on Woodfield Road, past the commercial area mentioned above. Tr. 24-25.

B. The Proposed Use

The proposed use is an unmanned wireless telecommunications facility, with an 80-foot “stealth” monopole, designed to look like a pine tree, and an equipment building within a 2,025 square-foot, fenced compound (45 feet by 45 feet). The monopole will be covered in a material which will simulate pine tree bark underneath faux limbs and foliage. The branches of the simulated foliage do not contain any operative elements. The faux limbs, which are inserted into the steel pole, will continue to a height of 87 feet. Antennas will be attached near the top, located behind the faux foliage, and will reach up to a height of approximately 85 feet. Exhibit 3. Samples of an ordinary monopole and a stealth tree monopole are shown below (Exhibit 8, p.120)⁵:



Typical Cell Monopole



Typical Stealth Tree Monopole

⁵ Two copies were provided of Exhibit 8, one with no page numbers and one with page numbers running from 118 to 151. (The odd starting point reflects its usage in the parallel HAWP case.) Similarly, there are two copies of Exhibit 29(c), one with page numbers beginning at 1, and one with page numbers continuing the HAWP labeling,

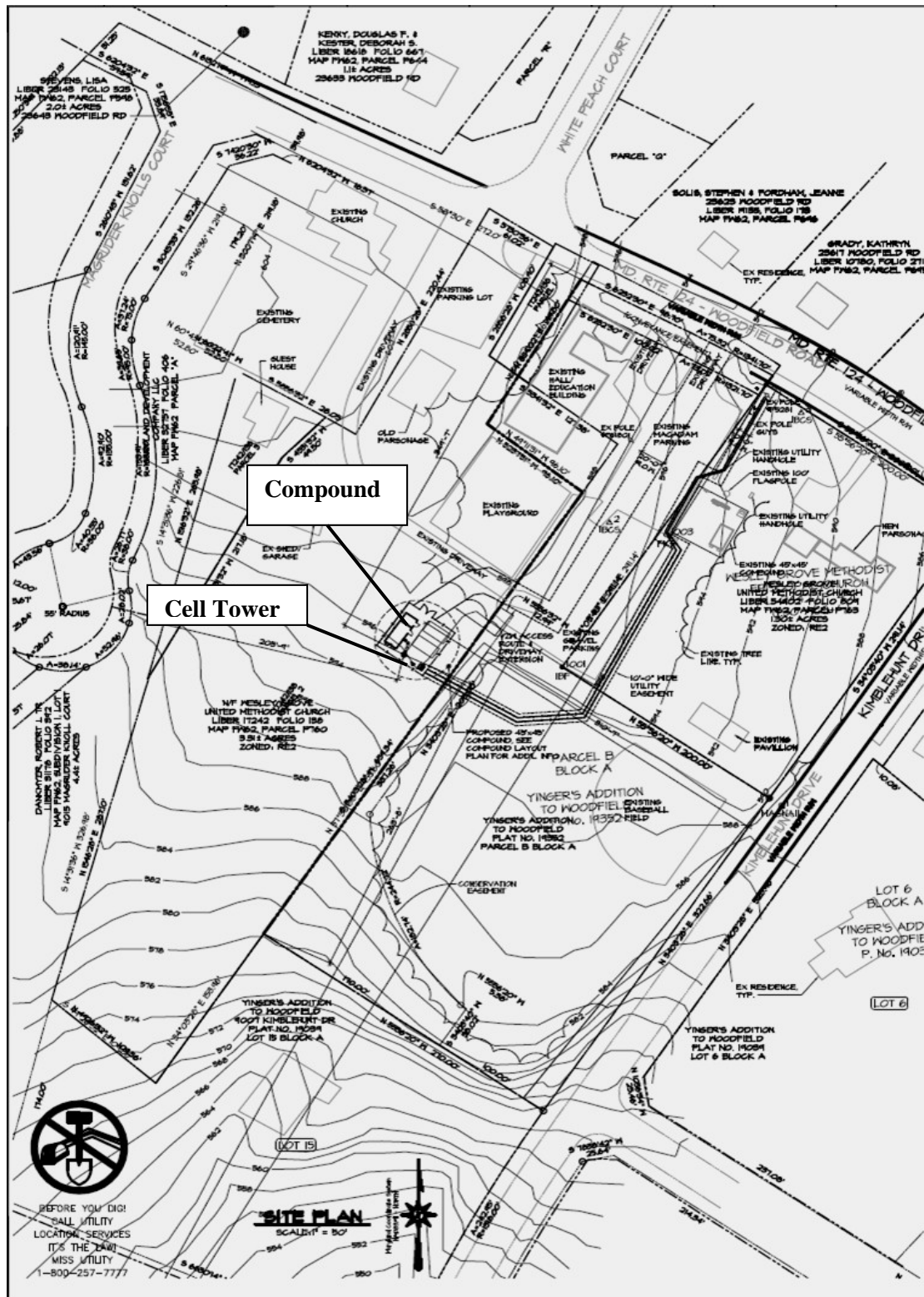
The monopole structure will be designed with capacity to hold the antennas and cables of at least two communications carriers (hereinafter the "Co-locators") in addition to the antennas and cables of Verizon Wireless. Exhibit 3. The proposed facility will be located approximately 350 feet from Woodfield Road, at the rear of the property, within a heavily wooded area. The monopole, which must meet a setback requirement of one foot for each foot of monopole height, is setback over 205 feet from the nearest exterior property line, and will be constructed approximately 355 feet from the nearest off-site residential dwelling.

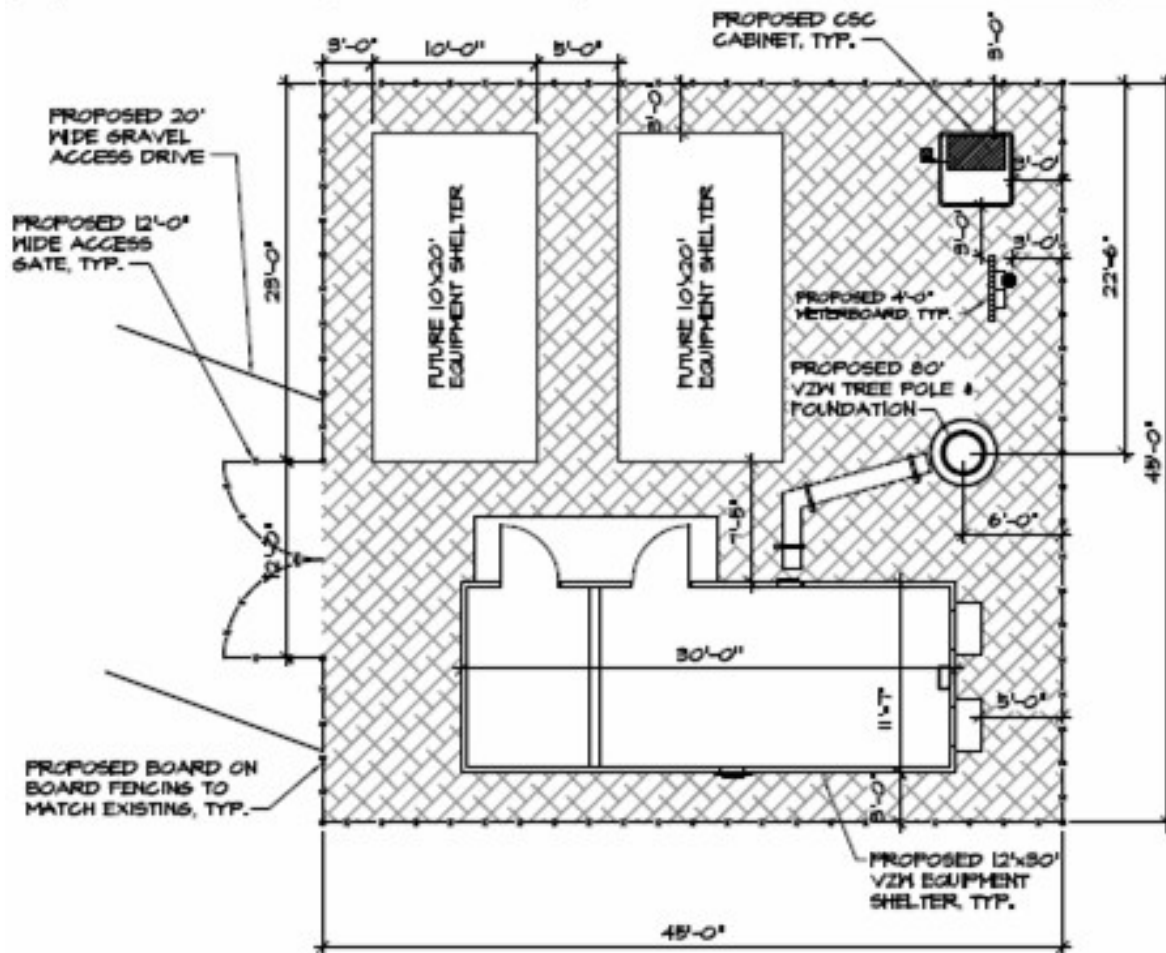
The proposed monopole will not be lighted and will contain no signage. It will be designed to meet all county requirements of the building code and to withstand wind velocities and icing conditions as determined by the county building code. It will also be designed to collapse upon itself if there were to be a failure, and it will be grounded for lightning. It doesn't give off any fumes or glare.

The proposed 12 foot by 30 foot equipment building will be approximately 11 feet in height and will be enclosed with an 8-foot high board-on-board fence. The site will operate continuously, but will be unmanned except for routine quarterly inspections and emergency visits. The equipment inside of the 12 by 30 foot building is essentially computer switching equipment. It processes calls that are transmitted and received, and routes them so that the calls can be completed. There will also be air conditioning, a backup electrical generator and backup batteries inside the equipment building. The generator is used in case of an emergency causing a power outage, and it is powered by diesel fuel. It will be in compliance with all county, state and federal laws and regulations.

The equipment shelter will not be lit on a regular basis. There is a small light located as shown on Elevation "A" of the Site Plan (Exhibit 29(a)), in between the two doors. It is motion activated. It will rarely be used because Verizon's regular maintenance is done during the day.

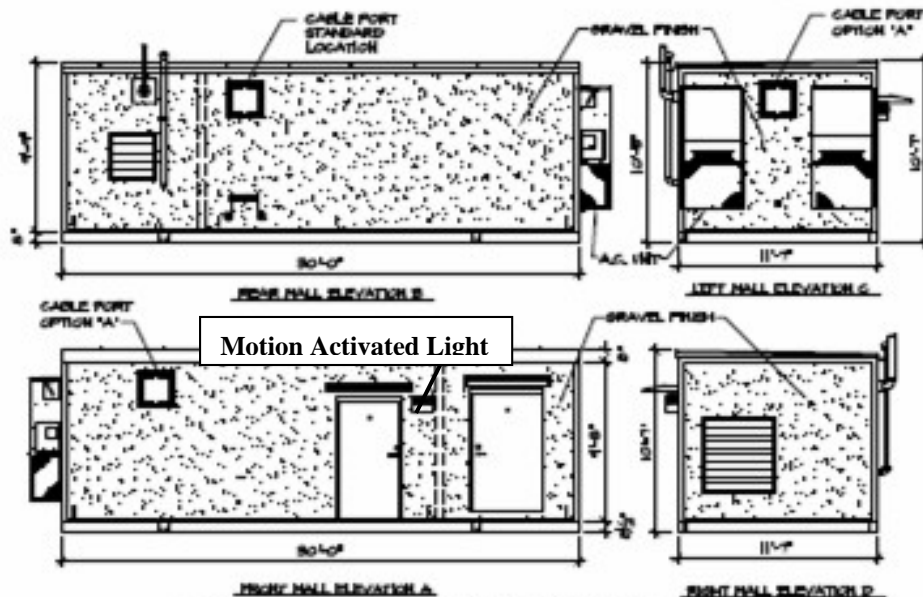
However, if there is a need for staff to come to that facility when it is dark, the light will remain on as long as there is activity at the site. The Site Plan (Exhibit 29(a)) is set forth below and on the following pages:





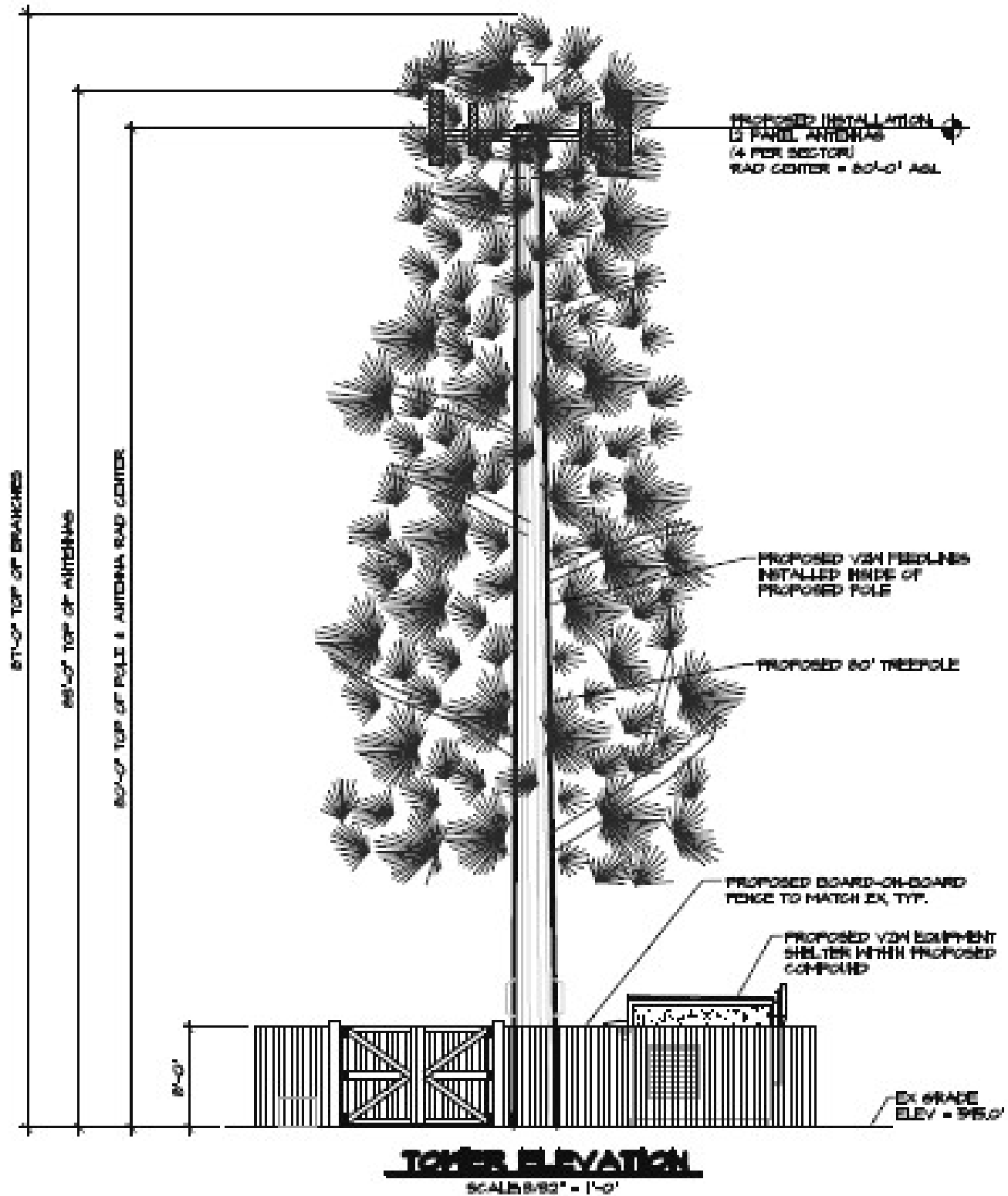
COMPOUND LAYOUT PLAN

SCALE: $\frac{1}{8}" = 140'$



TYP. VERMION HIVELESS SHELTER ELEVATIONS

DIMENSIONS SHOWN ARE FOR REFERENCE ONLY.



SITE NOTES:**1. APPLICANT:**

VERIZON WIRELESS
4000 JUNCTION DRIVE
ANNAPOLIS JUNCTION, MD 20701
TEL. (301) 512-2000
FAX (301) 512-2186

APPLICANT'S ATTORNEY:

M.S. DIAMOND
THE LAW OFFICES OF M. GREGG DIAMOND, P.C.
4416 EAST WEST HIGHWAY, SUITE 400
BETHESDA, MARYLAND 20814-4868
(301) 654-9181

2. PROPERTY OWNER:

NESLEY GROVE UNITED METHODIST CHURCH
23640 WOODFIELD ROAD
GANTHERSBURG, MARYLAND 20882-2816
CONTACT: NEIL FADELY (301) 484-5125

3. SITE DATA:

TAX MAP P162, PARCEL P160
PLAT: TAX ACCOUNT: 0044380
DEED BOOK: 17242 PAGE: 156
TRACT AREA: 8.51 AC. +/-
ELECTION DISTRICT: 12TH
ADDRESS: 23642 WOODFIELD RD
GANTHERSBURG, MD 20882
EXISTING USE: EXEMPT

4. CURRENT ZONING: RB-2

B. LATITUDE: N39° 14' 36.61"
LONGITUDE: W77° 11' 14.84"

GROUND ELEVATION: 595.00' AMSL (AVG.)
EXISTING STRUCTURE HEIGHT: 80.00' ASL
TOTAL ELEVATION ABOVE MEAN SEA LEVEL: 675.00'

6. TOTAL DISTURBED AREA = 4500 SF

7. THE PROPOSED FACILITIES WILL CONSIST OF ONE (1) 45'x45' EQUIPMENT COMPOUND WITH ONE (1) 12'x30'x12' HIGH UNOCCUPIED COMMUNICATION EQUIPMENT SHELTER AND TWELVE (12) ANTENNAS MOUNTED TO AN 80'x0" TALL STEALTH MONOPOLE DESIGNED WITH TREE MONOPOLE DISGUISE FOR TRANSMISSION AND RECEPTION OF VERIZON WIRELESS TELECOMMUNICATIONS. SHELTER FLOOR AREA 560 S.F.

8. NO WATER OR SANITARY UTILITIES ARE REQUIRED FOR THE OPERATION OF THIS FACILITY.

9. THIS SITE IS EXEMPT FROM THE FOREST CONSERVATION ACT APPLICABLE TO MONTGOMERY COUNTY PROPERTIES UNDER THE COUNTY CODE, CHAPTER 22A, SECTION 22A-8(b)(1).

10. STORMWATER MANAGEMENT NOTE: NO STORMWATER MANAGEMENT IS REQUIRED FOR THIS SITE.

11. THE EXTERIOR OF THE SHELTER SHALL BE A MASHED STONE FINISH.

12. BOUNDARY SHOWN PER COUNTY RECORDS. EXISTING SITE FEATURES SHOWN PER SURVEY BY MORRIS & RITCHIE ASSOCIATES, INC., JULY, 2008.

13. THIS PLAN PREPARED WITHOUT THE BENEFIT OF A TITLE REPORT. PLAN IS SUBJECT TO EASEMENTS AND RESTRICTIONS OF RECORD.

14. ALL DETAILS SHOWN ARE "STANDARD" OR "TYPICAL" FOR REFERENCE ONLY. FOR ACTUAL DETAILS, SEE ARCHITECTURAL, STRUCTURAL, OR CONSTRUCTION PLANS BY OTHERS. THE PROPOSED MONOPOLE SHALL BE CONSTRUCTED TO SUPPORT A MINIMUM OF THREE (3) TELECOMMUNICATIONS CARRIERS.

15. STRUCTURAL ANALYSIS/DESIGN TO BE PERFORMED BY OTHERS AT CLIENT AND/OR OWNER'S DISCRETION PRIOR TO COMMENCEMENT OF ANY WORK.

16. THE COMMUNICATION SHELTER SHALL BE UNMANNED, WITH INFREQUENT VISITS (FOUR OR FEWER PER YEAR) BY MAINTENANCE PERSONNEL, AND WITH ACCESS AND PARKING FOR NO MORE THAN ONE VEHICLE. THE PROPOSED FACILITY IS NOT FOR HUMAN HABITATION AND THEREFORE HANDICAP ACCESS IS NOT REQUIRED.

17. INSTALL AERDRAIN 380 SHEET DRAINING SYSTEM AS PRODUCED BY AMERICAN PECK DRAIN CORPORATION BENEATH LIGHTWEIGHT PAVERS ON THE COMMUNICATIONS SHELTER ROOF. (FOR SHELTER NEAR WATER TANK OR TOWER).

18. THE PROPOSED TREEPOLE MONOPOLE IS LOCATED MORE THAN 500 FEET FROM ALL OFF-SITE DWELLINGS.

19. THE PROPOSED TOWER & EQUIPMENT SHELTER SETBACKS ARE AS FOLLOWS:

MONOPOLE SETBACKS:

	<u>REQUIRED</u>	<u>PROVIDED</u>
FRONT	80'-0"	84'-11"
SIDE	80'-0"	205'-9"
REAR	80'-0"	265'-8"

EQUIPMENT SHELTER SETBACKS:

	<u>REQUIRED</u>	<u>PROVIDED</u>
FRONT	80'-0"	84'-6"
SIDE	80'-0"	107'-8"
REAR	12'-0"	264'-9"

GENERAL NOTES

1. CONTRACTOR SHALL NOTIFY "MISS UTILITY" (1-800-251-TTT1) 48 HOURS PRIOR TO DOING ANY EXCAVATION IN THIS AREA. CONTRACTOR SHALL CONTACT A SUBSURFACE UTILITY LOCATOR FOR LOCATION OF EXISTING UTILITIES PRIOR TO COMMENCEMENT OF ANY CONSTRUCTION ACTIVITIES. CONTRACTOR SHALL VERIFY EXISTING UTILITY LOCATIONS BY TEST PIT AS NECESSARY. LOCATION OF UTILITIES SHOWN ON THIS PLAN ARE APPROXIMATE AND FOR PLANNING PURPOSES ONLY. THE CONTRACTOR SHALL DETERMINE THE EXACT LOCATION OF ALL EXISTING UTILITIES BEFORE COMMENCING WORK, AND AGREES TO BE FULLY RESPONSIBLE FOR ANY AND ALL DAMAGES WHICH MIGHT BE OCCASIONED BY THE CONTRACTOR'S FAILURE TO EXACTLY LOCATE AND PRESERVE ANY AND ALL UNDERGROUND UTILITIES. DAMAGE TO UTILITIES OR PROPERTY OF OTHER BY THE CONTRACTOR DURING CONSTRUCTION SHALL BE REPAIRED TO PRECONSTRUCTION CONDITIONS BY THE CONTRACTOR.
2. ALL WORK SHALL BE COMPLETED IN ACCORDANCE WITH ALL STATE AND LOCAL CODES AND ORDINANCES, THE LATEST EDITION THEREOF.
3. ANY PERMITS WHICH MUST BE OBTAINED SHALL BE THE CONTRACTOR'S RESPONSIBILITY. CONTRACTOR SHALL SECURE ALL NECESSARY PERMITS FOR THIS PROJECT FROM ALL APPLICABLE GOVERNMENTAL AGENCIES. THE CONTRACTOR SHALL BE RESPONSIBLE FOR ABIDING BY ALL CONDITIONS AND REQUIREMENTS OF THE PERMITS.
4. CONTRACTOR SHALL COORDINATE ALL UTILITY CONNECTIONS WITH APPROPRIATE UTILITY OWNERS.
5. THESE PLANS ARE NOT FOR RECORDATION OR CONVEYANCE.
6. EXISTING PAVEMENT AND OTHER SURFACES DISTURBED BY CONTRACTOR (WHICH ARE NOT TO BE REMOVED) SHALL BE REPAIRED TO PRECONSTRUCTION CONDITIONS BY THE CONTRACTOR.

PER SECTION 59-G-2.58(a)(2) OF THE MONTGOMERY COUNTY CODE ZONING ORDINANCE.

- a. A SUPPORT STRUCTURE MUST BE SET BACK FROM ANY OFF-SITE DWELLING A DISTANCE OF 800 FEET IN RESIDENTIAL ZONES.
- b. N/A
- c. THE SETBACK IS MEASURED FROM THE BASE OF THE SUPPORT STRUCTURE TO THE BASE OF THE NEAREST OFF-SITE DWELLING.
- d. THE BOARD OF APPEALS MAY REDUCE THE SETBACK REQUIREMENT IN THE RESIDENTIAL ZONES TO A DISTANCE OF ONE (1) FOOT FROM AN OFF-SITE RESIDENTIAL BUILDING FOR EVERY FOOT OF HEIGHT OF THE SUPPORT STRUCTURE IF THE APPLICANT REQUESTS A REDUCTION AND EVIDENCE INDICATES THAT A SUPPORT STRUCTURE CAN BE LOCATED IN A LESS VISUALLY OBTRUSIVE LOCATION AFTER CONSIDERING THE HEIGHT OF THE STRUCTURE, TOPOGRAPHY, EXISTING VEGETATION, ADJOINING AND NEARBY RESIDENTIAL PROPERTY, AND VISIBILITY FROM THE STREET.

The Site Plan details displayed on page 13 of this report shows the potential location of two additional equipment buildings in the compound. Verizon will have a small sign at the entrance gate of the facility identifying its ownership, in conformance with Zoning Ordinance §59-G-2.58(a)(8). The facility will be secured 24 hours a day, including the outer fence and the equipment building, so that there is no public access to the equipment or to the monopole. If this tower facility were no longer needed for communication antennas, Verizon would remove the facilities.

The backup batteries provide two fundamental uses. Number one, they act as a filter to clean the electrical power coming into the shelter. They also provide backup in the transition period between when the generator senses a power loss, decides that the power loss is enduring, and starts the engine on the generator. Once the generator determines that there is an enduring power loss and

it switches the equipment over to the generator power, the batteries again act as a filter, but they also compensate for any transient losses in the power that might occur. If the generator fails, the batteries would allow technicians eight hours to get out to the site.

The batteries come in a rack. The racks are eight feet tall. They are paste cells, not liquid cells, and if there is a crack in a battery, it does not leak liquid on the floor. These are also safer batteries, since they are “vent free.” While they vent a minimal amount of hydrogen, it is not enough to combine with the oxygen in the room to cause an explosion. In the opinion of Verizon’s professional engineer, Joseph Joyce, this provides a safe source of power, and will not endanger the community. Tr. 120-131. The telecommunications facility will not create any noise, fumes, odor, dust or other nuisances for the neighborhood.

Mr. Joyce also opined that the generator system is very safe. The generator has a 210 gallon diesel capacity and a double-walled fuel tank. Nobody can access the fuel tank from outside the compound. You have to be inside the room to actually fill the tank. Nevertheless, appropriate hazmat permits will be obtained to cover the batteries and fuels stored on site.

The proposed use does not require public or private sewer or water; nor does the use require public storm drainage or any other public facility. There is a fire and rescue station on Ridge Road about three and a half miles away, and there is a police station in Germantown, on Aircraft Drive, about eight miles away. Those facilities are adequate to serve the proposed use, according to Petitioners’ land planner, Phillip Perrine. The facility will put virtually no burden upon transportation services since it will require only one visit per quarter.

Access to the facility will be provided from an existing gravel driveway. Verizon will need to add just a small, 10-foot drive, from the edge of the existing driveway into the wooded site.

Technical Staff reports no environmental concerns regarding the proposed use (Exhibit 16, pp. 4-5). The site is not located within a Special Protection Area or a Primary Management Area. There

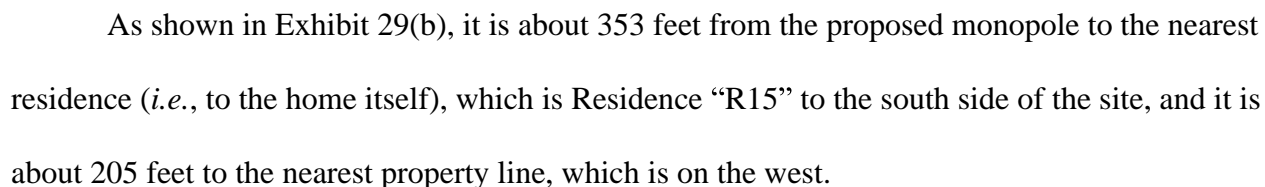
are no streams, wetlands, or other sensitive environmental areas on the site. Staff indicates that the project has an exemption (No. 4-07232E) from submitting a Forest Conservation Plan, pursuant to the Forest Conservation Law, County Code Section 22A-5(t). There is a forest conservation easement on Parcel B, but no part of the tower or equipment is within the easement. The site will not have to go through Subdivision, even though three parcels are involved, because there is an exception to the subdivision rules for telecommunications facilities.⁶

C. Impact of the Proposed Facility on the Neighborhood

The most significant issue regarding a telecommunications facility in a residential zone is its potential visual impact upon the neighbors. For the reasons explained below, the Hearing Examiner finds that the proposed monopole will not be a visual nuisance to the neighborhood. To assess visual impact, Petitioners took two steps. First, they produced a “Residential Setback Plan” (Exhibit 29(b)), which shows the distances from the proposed monopole to the nearest residences. Its key is reproduced below, and the diagram is shown on the next page:

RESIDENCE	DISTANCE 'X"
R1	416'-7"
R2	432'-5"
R3	489'-1"
R4	517'-1"
R5	475'-3"
R6	418'-6"
R7	401'-6"
R8	604'-0"
R9	646'-10"
R10	583'-3"
R11	469'-2"
R12	632'-2"
R13	718'-6"
R14	553'-5"
R15	353'-7"
R16	508'-2"

⁶ Montgomery County Code §50-9(g) provides: “Recording of a subdivision plat under this Chapter is not required for: . . . (g) Telecommunications towers/antennas, including associated accessory structures, unless or until other development of the land which requires a subdivision plan.”



Thus, the setbacks exceed those required by Zoning Ordinance §§59-G-2.58(a)(1) and (2). Subsection (a)(1) would require an 87 foot setback from the property line (one foot for every foot of tower height) and Subsection (a)(2) would require a 300 foot setback from the nearest dwelling.

As explained by Curt Westergard, Verizon's expert in assessing visual impacts, Petitioners also evaluated visual impact by doing a photo and simulation study. Photos were taken showing the existing condition, which were followed by simulated photos showing how the view will look after the stealth tower is added. A helium balloon, eight feet in diameter, was used to indicate the height of the proposed tower (Exhibit 8, pp. 121-122),⁷ and then a stealth pine tree tower was simulated into each photograph at that height (Exhibit 8, p. 122), as shown below and on the next page:



Two balloon tests were conducted (1/9/07 and 5/17/07) to evaluate the position and visibility of the proposed communications facility from various vantage points from nearby residences.

Procedure for 5/17/07 test:

An 8 ft. diameter helium aerostat balloon was floated directly over the monopole location. Its altitude was 87 ft from the ground level to the top of the balloon to mark the height of the tree monopole. It was flown for 3 hours on site while a survey crew monitored its vertical and horizontal position. At the same time a photographic crew documented the visibility from the community.

The height of the balloon was determined by a laser gun, and the top of the balloon was set at 87 feet.

Photos were taken during the winter of 2007, late spring (May) of 2007, and in the winter of 2008.

⁷ As mentioned earlier, two copies were provided of Exhibit 8, one with no page numbers and one with page numbers running from 118 to 151. (The odd starting point reflects its usage in the parallel HAWP case.) Similarly, there are two copies of Exhibit 29(c), one with page numbers beginning at 1, and one with page numbers continuing the HAWP labeling, from page 152 to 199. The HAWP numbering was used in this hearing for ease of reference.

These photographs and simulations were collected in Exhibits 8 and 29(c).



During balloon flight, the photographic crew constantly verifies with the survey crew that the position and height of the balloon are correct via radio transmission.



In the studio, the photographs are processed and based on the balloon position and scale, and a tree monopole is simulated into the photo.

Exhibit 8, page 123, shows the orientation of the photographs towards the monopole. The numbers show the locations from which the photos were taken, looking directly at the site of the proposed monopole. These are winter photos, so many screening trees have no leaves.

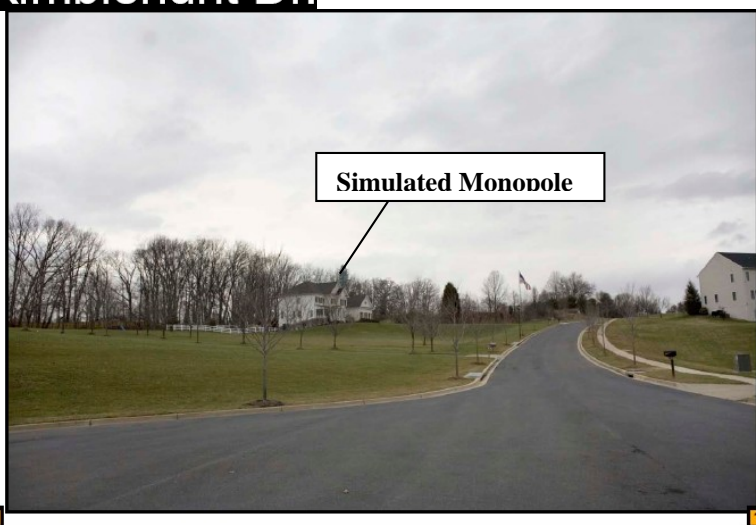


Some of these “before” and “after” winter photographs and simulations are reproduced below:

View from Kimblehunt Dr.



Photo shows existing conditions.



Computer simulation of the proposed tree monopole.

View from 23606 Woodfield Rd.

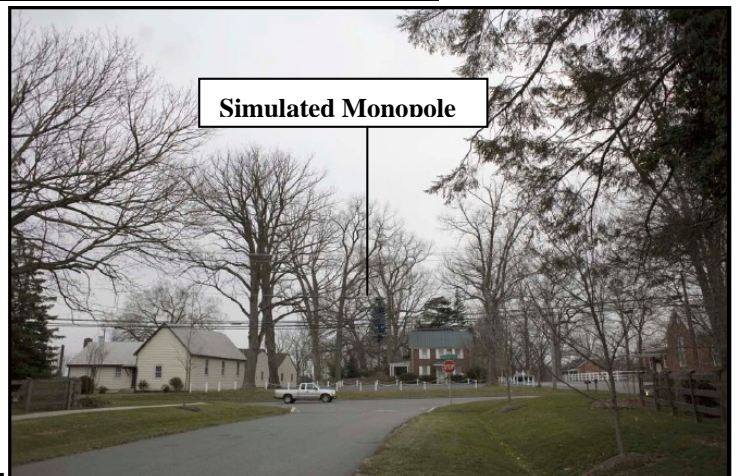
Photo shows existing conditions.



Computer simulation of the proposed tree monopole.

View from Woodfield Rd. & White Peach Ct.

Photo shows existing conditions.



Computer simulation of the proposed tree monopole.

View from White Peach Ct.

Computer simulation of the proposed tree monopole.



Computer simulation of the proposed tree monopole.

As noted, the above photos were all taken in the winter, which is the “worst case scenario.” In photos from similar locations during the summer, the stealth pole would be more obscured, and sometimes completely invisible, as in the summer photo taken from White Peach Court, below:

View from White Peach Ct.



The tree monopole not visible from this location.

It is worth noting that the one opponent of this proposed monopole, Louis Manza (Exhibit 32), lives about a third of a mile away from the site, a distance greater than the White Peach Court location from which the above photo was taken. It appears that the monopole will not be visible, or will be barely visible, from Mr. Manza’s home. Tr. 128-131.

There are numerous reasons why the proposed telecommunications facility will have little visual impact on the neighborhood. The 87-foot tower height complies with the Zoning Ordinance, and the proposed monopole structure has been designed and sited in a manner that will minimize its visual impact. It will be a “stealth” pole, designed to look like a pine tree, and it will be located

within a tree stand at the center of a large site, with many buildings and tall trees to screen its appearance. While the pole may be taller than most trees, it is well distanced and will not be lighted. The access road to the monopole site is actually an access road that already exists on the property, with only a short spur being added to reach the tree stand where the monopole will be located.

For all these reasons, the Hearing Examiner agrees with Technical Staff's finding that "[t]he stealth monopole will visually blend into the landscape . . ." Exhibit 16, p. 7.

Petitioners' land planning expert, Phil Perrine, testified that the facility will be in harmony and compatible with the surrounding neighborhood; will not cause any objectionable noise, vibration, fumes, odor, dust, or glare; and will not adversely affect health, safety, security or welfare of residents or visitors. In fact, the new equipment will provide better coverage, which will add to the safety of people that live or drive nearby this area. Tr. 9-44. As mentioned in the previous section of this report, the generator and the battery backup system will not endanger the neighborhood, and the new use will also not burden local transportation facilities since it will require only one visit per quarter.

Petitioners also introduced a study by a real estate consulting firm, Lipman Frizzell and Mitchell, LLC, which evaluated the potential economic impact of the proposed use upon the neighborhood. Exhibit 11. The study concluded that "the proposed monopole and equipment building will not impact negatively on its immediate or general surroundings." Exhibit 11, p. 10. Although the author of the report did not testify at the hearing, there is no evidence in this case contrary to the findings of the study.

The operation of the proposed use will not adversely affect electric supply to the neighborhood, nor will the proposed facility interfere with radio or TV reception. Tr. 71.

Finally, Petitioners' agent testified that Verizon is licensed by the federal government – *i.e.*, the Federal Communications Commission (FCC) – to conduct the proposed use (Tr. 51-52), and Petitioners placed an “EMF Compliance Report” into the record as Exhibit 10.⁸ The FCC regulates radio frequency exposure issues on a Federal level, and local officials are prohibited from deciding, based on health concerns, that a facility is inappropriate, as long as it complies with FCC regulations. Section 704(B) of the Telecommunications Act of 1996, 47 USC §332(c)(7)(B)(iv), provides, *inter alia*, that

No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission's regulations concerning such emissions.

The EMF Compliance Report was prepared by a firm called Telecom Specialists, Inc., and its president, Andrew Pak, certified that the proposed facility will comply with FCC-set standards for RF emissions. Exhibit 10, p.10 and Exhibit 45(a), p. 11.⁹ The author of the report also did not testify at the hearing, but once again there is no evidence in this case contrary to his findings.

The Hearing examiner finds, based on the uncontroverted evidence, that the proposed use, though it will be visible from some vantage points, will have no non-inherent adverse effects on the surrounding community.

D. Need for the Proposed Facility

Even though this petition has been recommended by both the Transmission Facilities Coordinating Group and the Planning Board, the Board of Appeals “must make a separate, independent finding as to need and location of the facility.” Zoning Ordinance §59-G-2.58 (a)(12).

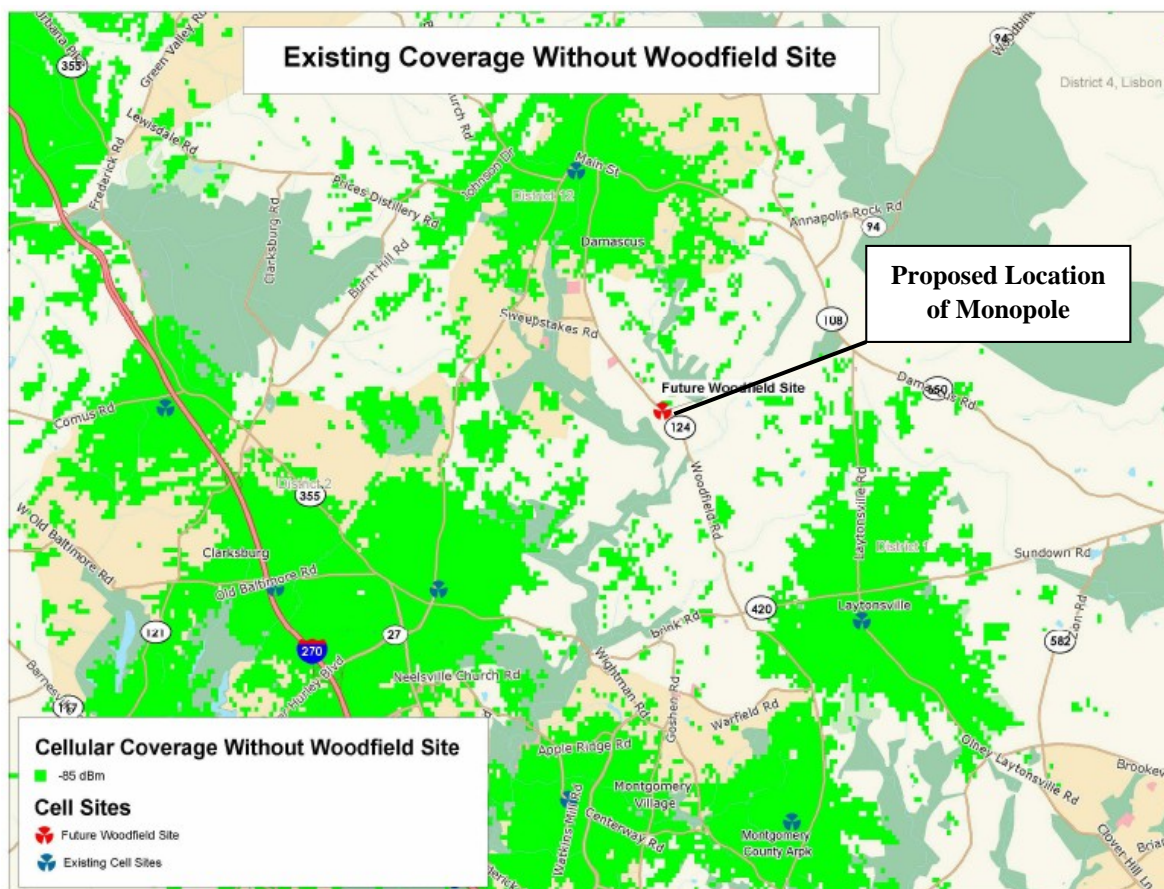
⁸ “EMF” stands for Electromagnetic Field, which in this case is a shorthand for the impact of the radio waves produced by the cell tower upon its surroundings.

⁹ Exhibit 45(a) is the signed version of Exhibit 10.

Petitioners presented evidence at the hearing as to both the need for, and the proper location of, the proposed telecommunications facility. That testimony came from Verizon's consulting real estate manager, Robert Posilkin and from a Verizon radio frequency (RF) engineer, Luke Neiswander. Tr. 110-120.

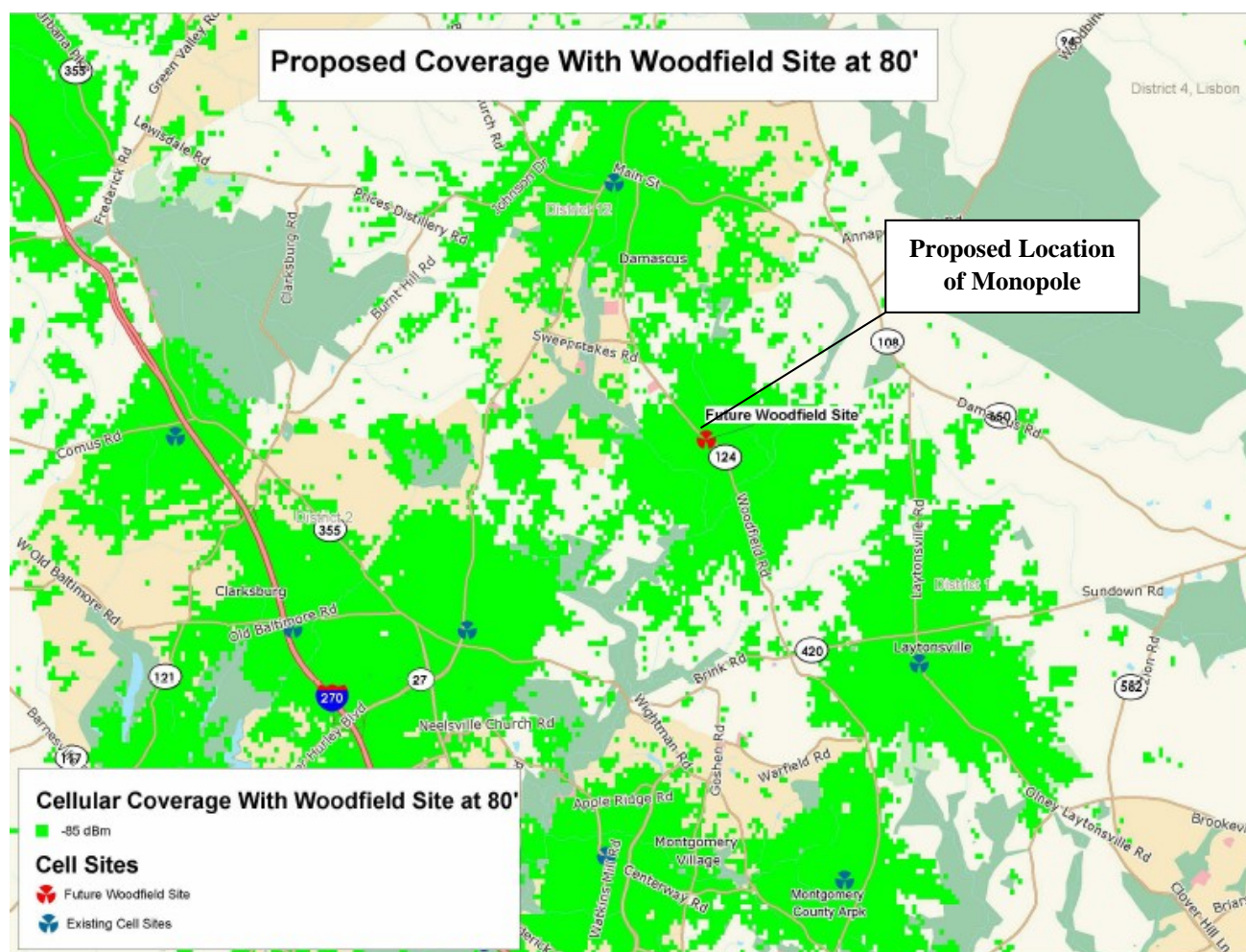
Mr. Neiswander identified Exhibit 9(a) as an existing cell coverage map, showing the area around the subject site. It is used to see what Verizon coverage looks like in a particular area, and where Verizon may need an additional cell site. Coverage in the area is depicted with a green color (*i.e.*, the darker area in the black and white printed version of this report). Existing cells are labeled, and the blue colors indicate the direction of the antennas, making up an entire 360 degree circle and showing an operational site. All of these sites are linked, so that the antennas are visible to one another, in order to provide the highest possible level of service.

A copy of Exhibit 9(a), showing existing cell coverage in the area, is reproduced below:



As explained by Mr. Neiswander, Verizon Wireless instructed him to search the Woodfield Road area for a site because there were customer complaints in the area, plus the existing conditions coverage map of the Woodfield Road neighborhood (Exhibit 9(a), above) showed a coverage hole inside the area.

Surrounding existing cell sites there is a green color, which represents Negative 85 decibels coverage. That is acceptable coverage for Verizon Wireless. “Neg 85” is considered the acceptable standard because it is the signal level needed for maintaining a call. Mr. Neiswander indicated that there is not a lot of that green color showing on Exhibit 9(a), above, immediately surrounding where the proposed facility would be located. Exhibit 9(b), below, shows coverage of the same area with the proposed site, and antennas mounted at 80 feet.



This proposal would provide additional coverage and linkage with the cell site to the north in Damascus. If the antennas were mounted below 80 feet, according to Mr. Neiswander, the new cell tower would not be able to provide sufficient linkage with the Damascus cell site.

Mr. Neiswander explained that Exhibit 9(c) represent what's known as a “drive test.” In the drive tests, a crane was brought to the subject site and an antenna was mounted at various levels (50, 65 and 80 feet). At each level, an RF engineer, driving the nearby roads, tested the signal levels received at different locations. A measurement was also taken without any additional signal, and it is represented in Exhibit 9(c), below. The red color (*i.e.*, the darkest shade in the black and white printed version of this report) represents a signal level that's not acceptable to Verizon Wireless. Green and blue (shown as gray in the black and white printed version of this report) represent signals that are acceptable or better than acceptable.

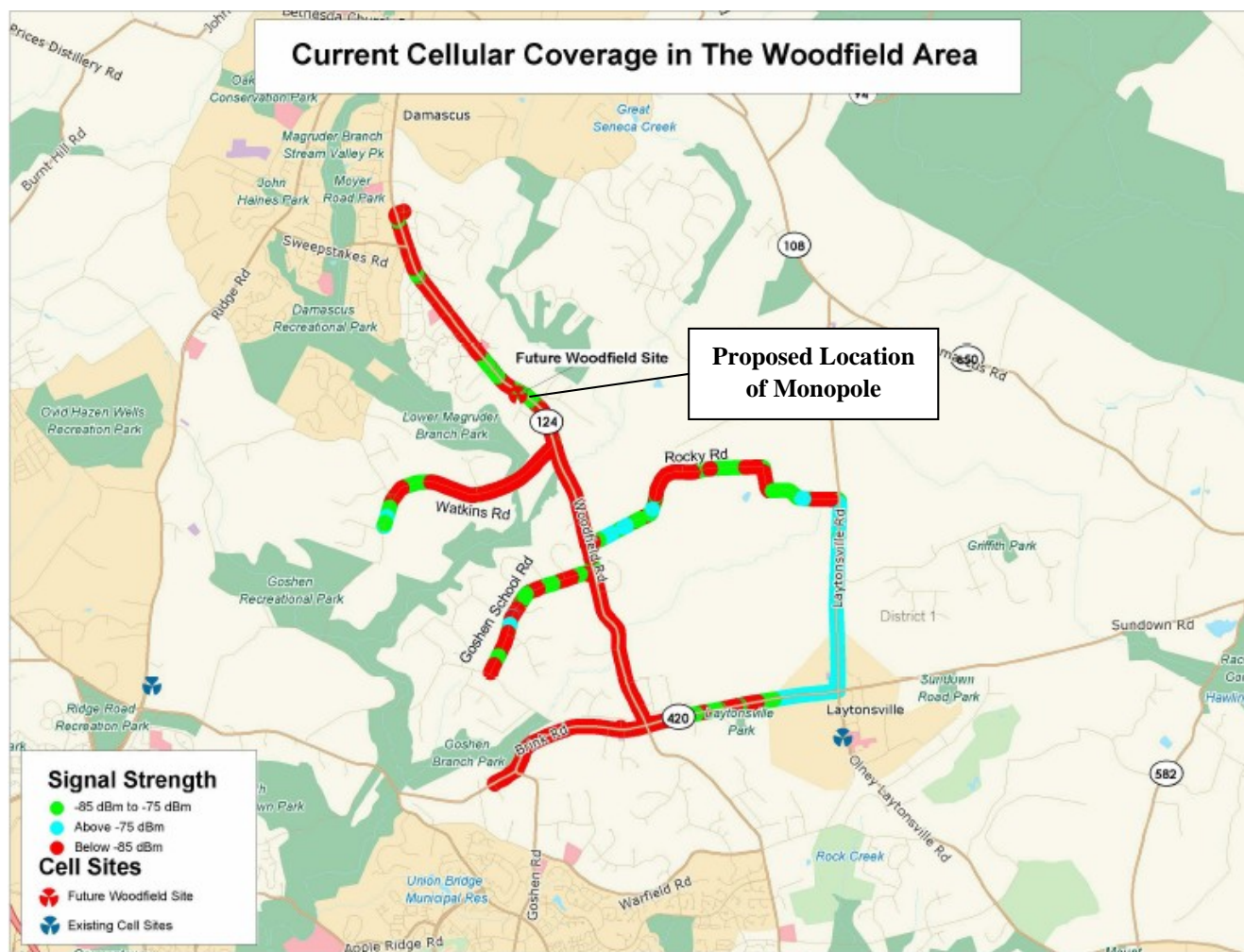
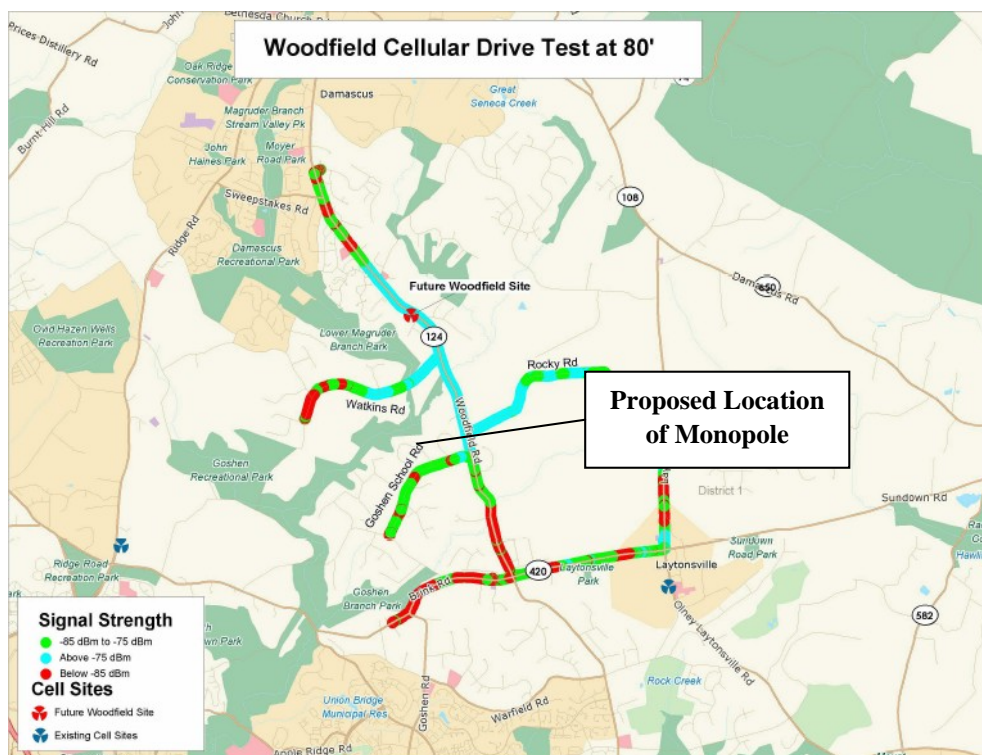
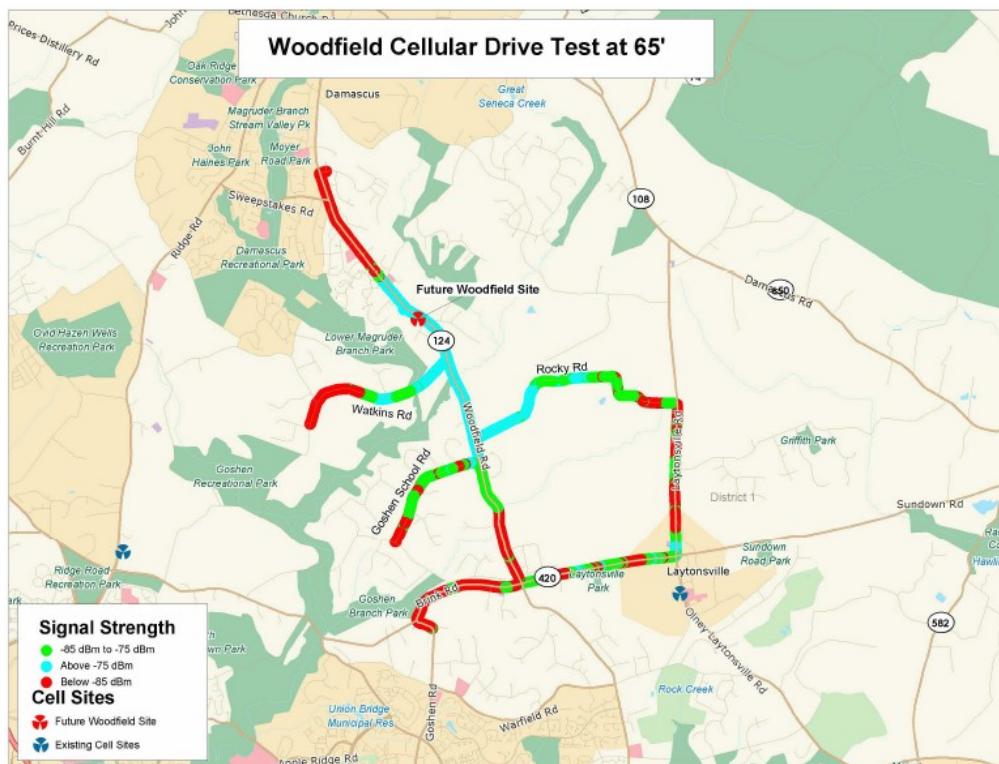


Exhibit 9(d), below, represents the Woodfield Drive test with the antenna at 80 feet, which shows green and blue (*i.e.*, acceptable) levels along the drive path.



Mr. Neiswander also did tests with the antennas at 50 feet and 65 feet, which showed an inadequate signal. The 65 foot drive test is shown in Exhibit 9(e), below:



Mr. Posilkin, Verizon's consulting real estate manager, testified (Tr. 45-73) that he searched for existing structures in the area of the service gap which would be suitable for mounting the needed antennas. The Sprint flag pole located on the church property on Woodfield Road was an existing structure that appeared to be the appropriate height, and also, it was located within the search area itself. Unfortunately, Sprint already had two other carriers located at the highest points within that flagpole structure.

In the flagpole design, the antennas are inside of the structure, so that the antennas must be stacked one on top of the other, rather than being on a horizontal plane,. That flagpole is 100 feet tall, but Sprint and Nextel are located within the two upper bays. Verizon Wireless required at least two bays (two spaces within that pole) for its antennas, because it transmits on two different frequencies (50 and 1900), and would thus need to stack those antennas. As a result, the height available within that flagpole was insufficient to do the job. Verizon tested at a height of about 50 or 60 feet, which would be available in that structure, and it was determined that it was simply too low to meet the RF requirement of that area.

Another existing structure was considered, a water filtration treatment center that is under the jurisdiction of the Washington Suburban Sanitary Commission. They do have a large tower, 200 feet or taller, that is being used by another carrier. Unfortunately, it is located well outside of the search area. Verizon Wireless attached antennas to that structure at the maximum height, and even at that height, the transmission did not meet Verizon's radio frequency objectives because it was simply too far to the northwest.

There were no other suitable structures nearby to be considered. Since no existing, adequately tall structures were available, Mr. Posilkin found it necessary for Verizon to construct its own tower, tall enough to provide the necessary wireless coverage. He testified that without the proposed facilities, there would be detrimental effects to Verizon Wireless customers or the general

public. The most detrimental effect is that members of the public who rely on wireless coverage are receiving an unreliable signal. Verizon's data showed that calls are simply not going through at the busy intersection of Brent Road and Woodfield Road. In addition to that, Verizon needed improved coverage along Woodfield Road. In a worst case scenario, if people were in an emergency situation, Verizon's data shows that they will not be adequately served, absent the proposed facility.

There is no evidence in the record to contradict the testimony of Messrs. Posilkin and Neiswander, and the Hearing Examiner credits that testimony as being accurate and persuasive. Based on that testimony and on the recommendations of the Transmission Facilities Coordinating Group, the Technical Staff and the Planning Board, the Hearing Examiner finds that there is a need for the proposed telecommunications facility, and that it is appropriately located.

E. The Master Plan

Petitioners' property is located within the 2006 Damascus Master Plan area. The Master Plan does not appear to address telecommunications facilities, as such, but Technical Staff, in their discussion of the Master Plan (Exhibit 16, p. 3), noted that the subject site is located in a transition area on land recommended for RE-2 zoning, which does permit the special exception sought here.

With regard to special exceptions, the Master Plan provides (p. 103):

“... [W]hen special exceptions are proposed in the Transition and Rural areas within the Damascus Master Plan, their review should take into special consideration the preservation of these long vistas that are a part of the unique character of this community. Any proposed land use that would impede those vistas should be discouraged unless it serves an important public purpose.

Technical Staff found that “[the] ‘stealth’ design will allow the proposed structure to exist without interfering with views from the surrounding residential area.” It is thus “consistent with the Adopted and Approved Master Plan.” Exhibit 16, p. 3. Staff also observed that the proposed monopole will be sited on the property among a stand of existing trees, and will be designed to look like a large pine tree.

Mr. Perrine testified that approval of the special exception would be consistent with the Master Plan recommendations. He noted that the Master Plan itself recommends RE-2 zoning, and there is no discussion of whether special exceptions are appropriate in this particular area. Mr. Perrine also observed that the Master Plan recommends not impeding the long vistas within the entire Damascus area. In his opinion, the way the monopole is designed and located, it will not impede those vistas. Tr. 42.

Given the evidence that the proposed monopole will not obstruct “long vistas” and the fact that the Master Plan supports the RE-2 Zone, which permits the subject use by special exception, the Hearing Examiner concludes that the planned use is not inconsistent with the goals and objectives of the *Damascus Master Plan*.

III. SUMMARY OF HEARING

At the inception of the hearing, the Hearing Examiner put into the record, as Exhibit 33, a copy of the Board of Appeals Opinion in A-6241, which reversed the Historic Preservation Commission's denial of an historic area work permit, effective January 9, 2009. Petitioners called five witnesses, Robert Posilkin, a Verizon real estate manager; Phil Perrine, an expert in land planning; Joseph Joyce, a licensed engineer; Curt Westergard, an imaging expert; and Luke Neiswander, a radio frequency (RF) engineer. M. Gregg Diamond, Esquire, represented Verizon and the Wesley Grove United Methodist Church. Mr. Diamond stated that his clients accept both the Technical Staff's report and the Planning Board's letter, including its recommended conditions. Tr. 7-8. The record was held open until February 27, 2009, so that Petitioners could file additional information and electronic copies of certain exhibits.

1. Phillip Perrine (Tr. 9-44; 128-131):

Phillip Perrine testified as an expert in land planning. Using aerial photos (Exhibits 36 and 37), Mr. Perrine described the subject site, which is zoned RE-2, and the area surrounding it. The

site will not have to go through Subdivision, even though three parcels are involved, because there is an exception to the subdivision rules for telecommunications facilities.

He noted that there's a forest conservation easement area, a Category I easement area that protects the trees that are on southern portion of the site, but the easement is only within the boundary of Parcel B, and the actual site of the tower and the equipment area is not in the easement. Adjacent to the new parsonage, just to the east, is the area of an existing 100 foot tall Sprint flag pole that includes telecommunication antenna equipment. Originally, Verizon's monopole was to be located near the Sprint monopole, but it was re-sited to comply with setback requirements imposed after the Sprint pole was erected. It will be located in a tree stand, but will be somewhere between 20 and 30 feet higher than those trees.

Mr. Perrine introduced Exhibit 38, a map of Woodfield Historic District, which has been approved and adopted into the Historic Master Plan. He also defined the surrounding area as Pleasantview extended to the north across Woodfield, and Watkins Road extended to the north, in between the two creeks. This is similar to what the Technical Staff has described as their surrounding area. By and large, in addition to the church, it is residential development, with other residential development to the south and west. It is in the RE-2 Zone, and to the north is RE-2C, which is a cluster form of RE-2. C-1 zoned property is just to the north.

Other than the Sprint telecommunications facility, the only other special exception in the neighborhood is an accessory apartment further up Woodfield Road, well beyond the commercial area that's along Woodfield.

In Mr. Perrine's opinion, approval of the proposed special exception would not affect the area's existing residential character. The proposed monopole is a stealth pole disguised as an evergreen tree. In this area, there are a good number of trees, forested area, including evergreen and deciduous. It also includes utility poles along Woodfield Road that are part of the viewshed, and the

church buildings are very close by, which all cause the pole to kind of blend in with the existing environment that's there.

Mr. Perrine visited other tree monopoles constructed by Verizon Wireless in Montgomery County – 11511 MacArthur Boulevard, which was approved in S-2279, and Avenel Golf Course, located at 10010 Oaklyn Drive in Potomac, approved in special exception S-2347. They are both in residential areas which were unchanged by the monopoles.

Mr. Perrine described the monopole proposed here, and its setting: The pole itself is 80 feet tall, but with the antennas and materials, extends to 87 feet. The setback is a little over 205 feet to the exterior property line of this property, these three parcels. The nearest residence is to the south about 355 feet or so (R-15 on the Setback Plan), and other residences are over 400 feet from the pole.

Mr. Manza's house, the sole opponent here, is located on a cul-de-sac served by a long private driveway northwest of the site, and his home is about 1750 feet away from the proposed monopole. He is just inside the defined neighborhood, and Mr. Perrine noted his location on Exhibit 37. Mr. Perrine noted that, although there are no photographs taken directly from the Manza property, is it fair to say that, at most, Mr. Manza might see some small portion of the top of the Verizon tree monopole. It will be 1700 feet away, and there are a couple of sets of tree lines between him and the monopole. There are mature trees along Woodfield Road that are taller than the monopole.

Mr. Perrine also disagreed with Mr. Manza's suggestion that a plain steel tower would be less visible. In the setting where this proposed tower is to be located, a stealth tree would appear to be a tree top amongst other trees, while a plain steel tower normally has a triangular set of antennas, which would stand out.

According to Mr. Perrine, the proposed tree monopole has been sited on the church properties in a manner designed to minimize its visual impact. The pole itself will be located about 350 feet back from the right of way of Woodfield, and the topography slopes downward. Along Woodfield Road, besides the houses, there are the church building, the education building, and the parsonage, that intervene between people driving along the road and the tower, the base equipment building and the fencing around the building. The Pole will be located about 80 feet inside the edge of the tree stand.

There's about 150 feet of forest going to the north and west from the monopole to the edge of the property, and the distance to the residents to the far southeast is 418 feet, 6 inches; in between there's the baseball field and the back stop equipment, all the things that are there on the field. So, it is situated properly back amongst the trees, behind the buildings that face along Woodfield Road. In addition to the tree stand that it sits within, there are large specimen trees to the front of the property. There's a forested area to the back, and there are individual mature trees along Woodfield Road including deciduous as well as evergreen trees. As you go further along Woodfield, there is a considerable tree stand further up near the commercial property, with trees that are very mature and very tall. Along the frontage of the subject property, there are mature trees along the road. Also, between the church property and the new subdivision immediately to the north on the same side of Woodfield Road, there is a tree stand within Magruder Knolls Court itself.

Verizon Wireless has proposed screening or landscape to at least six feet in height around the communications facility, in the form of an eight-foot, board fence that's proposed to encircle the equipment building and the entire site of the facility.

The underlying property owner is a co-applicant in this case, and the facility has been designed for at least three carriers to place their antennas on the structure. There will be no signs or illumination planned for the tower itself, and the only light will be on the equipment building,

between the doors, as indicated on the elevations part of the site plan.

Verizon is not proposing any outdoor storage of equipment. The equipment shelter would contain everything. The transmission facility coordinating group, better known as the tower committee, approved the project in March of 2007. In Mr. Perrine's opinion, the telecommunications monopole and the telecommunications facility are required for public convenience and necessity at this location. The proposed structures and use at this location would not endanger the health and safety of residents or workers in the area. The setback is greater than the height of the tower. It's set back 353 feet from the nearest residence, and it's designed to collapse upon itself if there were to be a failure. It will be constructed to code and grounded for lighting. It doesn't give off any fumes or glare.

In Mr. Perrine's opinion, the proposed facilities will not be in any way detrimental to neighboring properties. There's virtually no traffic related to it. It's an unmanned facility with something on the order of a monthly visit.¹⁰ The equipment is located within this building encircled by the fence, and there's a generator that is tested once a week, and that's about it in terms of activity. The proposed use will be in harmony and compatible with the surrounding neighborhood. The facility is designed to diminish its appearance or obviousness as you drive by. It's 350 feet back from the road. And, there are the church building, parsonage, education building and other houses and buildings along Woodfield that screen the view of the base of the tower. It's located within a wooded area. The area does include other vertical elements. Besides the trees, there is the Sprint flag pole and utility poles. There are other free-standing or independent evergreen trees that are mature. This monopole would then blend in with that forested setting. It's a very low intensity use.

Within the defined neighborhood, there is the Woodfield Historic District. An historic area

¹⁰ Verizon's agent, Robert Posilkin, testified that regular visits to this facility will be made quarterly, not monthly. Tr. 68. This difference is immaterial, but since the quarterly visit schedule is consistent with Site Note 16 on the Site Plan (Exhibit 29(a)), the Hearing Examiner will use that figure in this report.

work permit will be issued as a result of the appeal in case No. A-6241. The Board of Appeals found it would be essentially compatible with the historic district because the basis of the finding to establish the historic district was that Woodfield was a linear community along Woodfield Road, characterized by its rural streetscape, the mature trees along the road, and the orientation of the houses to the road, and the modest scale of the architectural elements of the buildings along that road. So, they were describing essentially a corridor rather than a broad area. And, the location of this monopole is 353 or so feet back from the road, away from that environment that was being established for the historic district. Exhibit 38, the map of the Woodfield Historic District, demonstrates its linear nature. It includes the properties along both sides of Woodfield Road, but not including the more recent development or the cul-de-sac on a private drive to the north. It includes all of the properties upon which a house sits. It also includes all the church property, where the tower will be located.

Mr. Perrine testified that some of the inherent effects of the tower are its height and visual appearance. This tower will be 87 feet tall compared to the existing flag pole tower that's 100 feet. This tower is set amongst trees and designed to be disguised as a tree to fit in. The only non-inherent aspects are the facts that it is adjacent to an existing tower flag pole and that it is within an historic district. As the Board of Appeals found, this tower will not adversely impact on the Historic District. The base and equipment, and the tower will be well screened.

[The Hearing Examiner indicated that he would treat the Board's opinion on the historic preservation issue, as the law of the case in this case, or if not that, collateral estoppel, on the issue of historic preservation. Petitioners' attorney agreed, but noted that there still needs to be a finding in this case of compatibility with the entire neighborhood. Tr. 40-41.]

Mr. Perrine further testified that a telecommunications facility as proposed is a special exception use in the RE-2 zone. The Damascus Master Plan adopted in June of 2006 is applicable.

In his opinion, approval of the special exception would be consistent with the Master Plan and the master plan recommendations. The Master Plan itself recommends RE-2 zoning. There is no description of whether special exceptions are appropriate in this particular area. This plan is silent. It's not within an area that is proposed for public sewer, so you would not have that intent to develop and link to the public sewer. On page 103 of the Master Plan, some special exception guidelines essentially recommend the importance of not impeding the long vistas within the entire Damascus area. In his opinion, this pole, the way it's designed and the way it's located, will not impede those vistas. It will be in harmony, considering the issue of design, scale and bulk of structure.

There is essentially no other room on the Sprint tower for this facility that meets all the specifications or requirements. So, that tower would have to be made taller, if Petitioners were going to try to put this facility on there, or it would have to be a second tower, as has been proposed, with a lower height, which is a superior way to go. The proposed use will not be detrimental to the use, peaceful enjoyment, economic value or development of the surrounding neighborhood because it will be a low activity use, producing no noise and virtually no lighting or fumes. The experience at other locations, Avenel and Great Falls, of this type of a tower amongst this type of zoning in residential pattern has caused no change. The proposed use will cause no objectionable noise, vibration, fume, odor, glare or physical activity; nor will it adversely affect health, safety, security or welfare of residents or visitors in the area. The proposed use does not require public or private sewer or water; nor does the use require public storm drainage or any other public facility.

Fire and rescue facilities are available on Ridge Road about three and a half miles away, and there is a police station in Germantown, on Aircraft Drive, about eight miles away. Those facilities are adequate to serve the proposed use.

2. Robert Posilkin (Tr. 45-73):

Robert Posilkin testified that he is a consulting real estate manager for Verizon Wireless. He

described his background, indicating his involvement in this field since 1996. His primary responsibilities are to identify properties throughout the Washington Metropolitan area where Verizon Wireless requires improved wireless coverage; to lease those properties; and to take those properties through local approval processes so that the facilities can be constructed and begin operations.

Verizon Wireless assigned Mr. Posilkin the task of constructing a cell site in the area of Woodfield Road. Verizon's radio frequency engineers identify an area where there needs to be improved coverage by issuing what's called a search area. A search area is a single sheet of paper with a circle on it that identifies the physical area where Verizon needs to locate these facilities so that the improvement that's been the subject of that study can be made. In this instance, the search area issued showed a circle along Woodfield Road pretty much in the area surrounding the Woodfield United Methodist Church. It was Mr. Posilkin's responsibility to go out to that area and see where to construct the facility in order to improve coverage as identified.

Probably the most important factor is making sure that the facility is located in the area that maximizes the ability to provide the required coverage. He almost always look for locations within that search area because it's been identified as the prime location where these facilities can best do their job. Within the search area, he looks for available existing tall buildings or other structures on which to attach antenna. It's a top priority to see if there are already existing structures in that area of any type that are suitable to accommodate the antennas and equipment, and yet meet the height requirements that Verizon needs in order to provide the coverage that's required. He did so in this case.

The most apparent available facility was the existing Sprint flag pole located on the church property on Woodfield Road. It was an existing structure that appeared to be the appropriate height, and also, it was located within the search area itself. Unfortunately, Sprint already had two other

carriers located at the highest height within that flag pole structure. In the flag pole design, the antennas are inside of the structure, it's a form of stealth, so that rather than the antennas being on a horizontal plane, the antennas are placed one on top of the other. That flag pole was confirmed at a height of 100 feet, and Sprint, and Nextel are located within the two upper bays. Verizon Wireless required at least two bays, that is two spaces within that pole for its antennas, because it transmits on two different frequencies (50 and 1900), and would thus need to stack those antenna. As a result, the height available within that flag pole was insufficient for Verizon to do the job. Verizon tested at a height of about 50 or 60 feet, which would be available in that structure, and it was determined that it was simply way too low to meet the RF requirement of that area.

Another existing structure was considered, a water filtration treatment center that's under the jurisdiction of the Washington Suburban Sanitary Commission. They do have a large tower, 200 feet or better, that is being used by another carrier. However, because it is in the area well outside of the search area, Verizon Wireless attached antennas to that at the maximum height, and even at that height, the transmission did not meet Verizon's radio frequency objectives because it was simply too far to the northwest.

There were no other possible suitable structures nearby to be considered. If there are no tall structures available, then Mr. Posilkin considers the appropriate placement of a structure tall enough to provide the necessary wireless coverage.

Without the proposed facilities, there would be detrimental effects to Verizon Wireless customers or the general public. The most detrimental effect is that the members of the public who rely on wireless coverage are receiving an unreliable signal. Verizon's data showed that calls are simply not going through at the busy intersection of Brent Road and Woodfield Road. In addition to that, Verizon needed improved coverage along Woodfield Road.

In a worst case scenario, if people are in an emergency situation, they need for that phone

not only to work when the signal is transmitted, but when the signal is received. Verizon's data shows that they will not be adequately served, especially in an emergency situations.

Verizon's initial proposal to the Tower Committee was rejected; the Committee wanted Verizon to put an 80 foot pole disguised as a tree located with adequate setbacks. Based on the Committee's view, the current proposal places a tree monopole in a wooded area located on the church property as identified on Exhibit 29(a). The proposed height was lowered from the initial 100 feet to 80 feet. This is a smaller structure than the existing Sprint pole or the pole that Verizon had initially proposed because the antennas can be all located on the horizontal. Verizon does not need to stack them, because now they are on the outside rather than the inside of the underlying monopole.

Mr. Posilkin described the features on the Site Plan (Exhibit 29(a)). You come off of Woodfield Road on an existing curb cut, down a driveway so that the church building is on your right, and the existing Sprint facilities are on your left. You continue through a gravel area and make a bit of a right turn staying on the driveway. If you stop there, immediately to your left there is a treed area, and within that area Verizon proposes two major facilities. One is the tree monopole itself, and at the base of the tree monopole there will be a 45-foot by 45-foot, fenced-in area, an equipment compound to accommodate Verizon's equipment building as well as potentially two others. The utilities that are necessary to operate the site will be located underground. Verizon needs to add just a small, 10-foot drive from the edge of the existing gravel road into the woods itself.

The tree monopole design proposed in this case is similar to the ones that the Board of Appeals previously approved in Case No. S-2279, which is the site on MacArthur Boulevard at the entrance to Great Falls Park in Potomac, and the one approved by the Board of Appeals in Case No. S-2347 which is on the WSSC property at the Avenel Golf Course in Potomac.

The monopole structure will be designed to meet all county requirements of the building code and to withstand wind velocities and icing conditions as determined by the county building code. The antennas will be located at the 80 foot level, behind the faux pine needle branch material, so that they are difficult to see. The pole installed by Verizon Wireless will have the capacity to support antennas of two additional carriers.

The equipment inside of its 12 by 30 equipment building is essentially computer switching equipment. It processes calls that are transmitted and received, and routes them so the calls can be completed. There will also be air conditioning, a backup electrical generator and backup batteries inside the equipment building. The generator is used in case of emergency, a power outage, and it's run by diesel fuel. It will be in compliance with all county, state and federal laws and regulations.

The tree monopole will not be lit in any way. The equipment shelter will not be lit on a regular basis. There is a small light located as shown on Elevation "A" of Exhibit 29(a), in between the two doors. It is motion activated. It will rarely be used because on the rare occasions that Verizon does visit the site for regular maintenance, which occurs approximately once a quarter, it will be during the day time. However, if there is a need for staff to come to that facility when it's dark, the light will remain on as long as there is activity at the site.

The telecommunications facility will be unmanned and will not create any noise, fumes, odor, dust or other nuisance types of facts for the neighborhood.

Exhibit 29(a) also shows the potential location of two additional equipment buildings in the compound. The communications facility is enclosed by an eight-foot, board-on-board fence. Verizon Wireless have a small sign at the entrance gate of that facility identifying its ownership, in conformance with the County Code. The communications facility will be secured 24 hours a day, including the outer fence and the equipment building, so that there is no public access to the equipment or to the monopole. The operation of the proposed use will not adversely affect electric

supply to the neighborhood, nor will the proposed facility interfere with radio or TV reception in the neighborhood.

If this tower facility were no longer needed for communications antennas, Verizon would remove the facilities. Petitioners hired an expert, Ronald Lipman, to do an analysis of the effect on property values for a communications facility and its neighborhood. His report, which is Exhibit 11, found that the telecommunications facility at this location would not have a negative impact on real property values in the neighborhood.

Finally, Mr. Posilkin testified that the proposed facility would not in any way impair health, safety or welfare of residents or workers in the neighborhood.

3. Curt Westergard (Tr. 73-110):

Curt Westergard testified as an expert in assessing visual impacts of architectural and engineering structures. He prepared the photographs and simulations that are in Exhibits 8 and 29(c).¹¹ Exhibit 8, page 123, shows the orientation of the photographs towards the monopole. The numbers show the locations from which the photos are taken looking directly at the site of the proposed monopole.

Photos are taken showing the existing condition, which are followed by simulated photos showing how the view will look after the stealth tower is added. A helium balloon, eight feet in diameter, was used to indicate the height of the proposed tower (Exhibit 8, pp. 121-122), and then a stealth pine tree tower was simulated into each photograph at that height (Exhibit 10, p. 122). The height of the balloon was determined by a laser gun, and the top of the balloon was set at 87 feet. Photos were taken during the winter of 2007, late spring (May) of 2007, and in the winter of 2008.

¹¹ Two copies were provided of Exhibit 8, one with no page numbers and one with page numbers running from 118 to 151. (The odd starting point reflects its usage in the parallel HAWP case. Similarly, there are two copies of Exhibit 29(c), one with page numbers beginning at 1, and one with page numbers continuing the HAWP labeling, from page 152 to 199. The HAWP numbering was used in this hearing for ease of reference.

4. Luke Neiswander (Tr. 110-120):

Luke Neiswander testified as an employee of Verizon, working as a Radio Frequency (RF) Engineer. He stated that Verizon Wireless instructed him to search the Woodfield Road area for a site because there were customer complaints in the area, plus propagation maps showed a coverage hole inside the area.

Mr. Neiswander identified Exhibit 9(a) as an existing conditions coverage map of the Woodfield Road neighborhood. He explained that surrounding that existing cell site there is a green color, which represents Negative 85 decibels coverage. That is acceptable coverage for Verizon Wireless. "Neg 85" is considered the acceptable standard because it is the signal level most acceptable for maintaining a call. Verizon can guarantee at that signal level you'll hold a good phone call.

Mr. Neiswander indicated that there is not a lot of that green color immediately surrounding where the proposed facility would be located. Exhibit 9(b) shows coverage of the same area with the proposed site, and antennas mounted at 80 feet. This would provide additional coverage and linkage with the cell site to the north in Damascus. If you were to go below 80 feet, the new cell tower would not be able to provide sufficient linkage with the Damascus cell site.

Mr. Neiswander explained that Exhibit 9(c) represent what's known as a "drive test." In the drive test, a crane was brought to the subject site and an antenna was mounted at various levels (50, 65 and 80 feet). At each level, an RF engineer driving the nearby roads, tested the signal levels received at different locations. A measurement was also taken without any additional signal, and it is represented in Exhibit 9(c). The red color represents a signal level that's not acceptable to Verizon Wireless. Green and blue in the chart represent signals that are acceptable or better than acceptable. Exhibit 9(d) represents the Woodfield Drive test with the antenna at 80 feet. Mr. Neiswander also did tests with the antennas at 50 feet and 65 feet, which showed an inadequate signal.

5. Joseph Joyce (Tr. 120-131):

Joseph Joyce is a licensed professional engineer employed by Verizon, who gave expert testimony in that field. He explained that tree monopoles have to have a thicker base and a deeper foundation than ordinary monopoles because of the additional surface area subject to wind. It will meet applicable building code requirements.

Mr. Joyce also described the functions of the backup generator and backup batteries used at cell sites, and indicated that they will meet all applicable County, state, federal standards, including those for installing and storing fuel at the site. Verizon complies with Montgomery County's hazardous materials registration ordinance.

He described the backup batteries used at cell sites. The backup batteries provide two fundamental uses. Number one, they act as a filter to clean up the incoming electrical power coming into the shelter. They also provide backup between the transition when the generator senses a power loss, decides that the power loss is enduring, and starts the engine on the generator. There's a certain amount of time lag during which these batteries have to provide power to the equipment so there's not a glitch. Once the generator says this is an enduring power loss and it switches over to the generator, and the generator is supplying power to the equipment, the batteries again act as a filter, but they also carry through any of the transient losses in the power that might occur. If the generator fails, the batteries would allow technician eight hours to get out to the site.

The batteries come in a rack. The racks are eight feet tall. They are paste cells; not liquid cells. If there is a crack in the battery, it doesn't leak liquid on the floor. These are safer batteries. They're called vent free batteries because they vent a minimal amount of hydrogen, but not enough to combine with the oxygen in the room to cause an explosion. In Mr. Joyce's opinion, this provides a safe source of power, and will not endanger the community.

He also opined that the generator system is very safe. The generator has a 210 gallon diesel

capacity. It's a double walled fuel tank. You cannot fill the fuel tank from outside. You have to be inside the room to actually fill it.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioners have the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioners will have satisfied all the requirements to obtain the special exception, if they comply with the recommended conditions.

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioners comply with the conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by

unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a telecommunications facility. Characteristics of the proposed telecommunications facility that are consistent with the “necessarily associated” characteristics of telecommunications facilities will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with telecommunications facilities, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff mentions “height and visual impacts” as inherent physical and operational characteristics necessarily associated with a telecommunications facility use (Exhibit 16, p. 5). The Hearing Examiner would list the following inherent characteristics:

- (1) antennas installed on or within a support structure with a significant height;
- (2) a technical equipment area that may or may not be enclosed within a fence;
- (3) visual impacts associated with the height of the support structure;
- (4) radio frequency emissions;
- (5) a very small number of vehicular trips per month for maintenance; and
- (6) some form of back-up power.

The inherent effects of a typical monopole telecommunications facility would generally have only a visual impact on the neighborhood, since it would be noiseless, unmanned and require only occasional servicing. That is the case here, except that even the visual impact is small in this instance because the telecommunications facility will be set back far from the nearest dwelling and will be adequately buffered. There are no unusual characteristics of the site except for its location

within an historic district. As discussed in Part I of this report, the Board has already addressed that issue and found that the proposed use, as sited, is compatible with the Woodfield Historic District.

For all the reasons discussed in Part II. above, and considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concludes, as did the Technical Staff, that there are no non-inherent adverse effects from the proposed use which would require denial of the petition.

B. General Conditions

The general standards for a special exception are found in Zoning Code §59-G-1.21(a). The Technical Staff report, the approval of the Transmission Facilities Coordinating Group, the exhibits in this case and the testimony at the hearing provide ample evidence that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: A telecommunications facility is a permissible special exception in the RE-2 Zone, pursuant to Code § 59-C-1.31(b).

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.58 for a telecommunications facility as outlined in Part C, below.

(3) Will be consistent with the general plan for the physical development of the District, including any master plan

adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: Petitioners' property is located in the area subject to the 2006 Damascus Master Plan. The Master Plan does not appear to address telecommunications facilities, as such. Technical Staff concluded that because the Master Plan recommends the RE-2 Zone for this site, and the RE-2 Zone allows a telecommunications facility by special exception, the proposed use is consistent with the goals and objectives of the Damascus Master Plan.

The 2006 Damascus Master Plan does contain one specific guideline regarding special exception uses, and that is to preserve the long vistas available in the area (page 103). The subject proposal will not offend this recommendation, given its height, siting, stealth nature and screening.

The Hearing Examiner concludes that because the Master Plan supports the RE-2 Zone, and that zone permits the subject use by special exception, it is fair to say that the planned use is not inconsistent with the goals and objectives of the Damascus Master Plan.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: The proposed installation will be in harmony with the character of the

neighborhood because it will be minimally visible from the adjacent community due to the large setbacks, landscape buffers and stealth design. There will also be no significant impact on traffic or parking. The proposed use is a low intensity use, only requiring on-site personnel for emergency repairs and regularly scheduled maintenance visits once a quarter. Exhibit 29(a), Site Note 16. Based on these facts and the other evidence of record, the Hearing Examiner concludes, as did Technical Staff, that the proposed use will be in harmony with the general character of the neighborhood.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Technical Staff found the telecommunications facility will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood. The Hearing Examiner agrees for all the reasons stated immediately above, and based on findings of the real estate impact study (Exhibit 11) discussed in Part II.C. of this report. Therefore, the Hearing Examiner finds that the telecommunications facility will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The tower will have no lights, and the equipment building will not be illuminated at night except when night-time servicing is required. Petitioners' land use expert

testified that the special exception would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site.

Technical Staff agreed. Thus, the undisputed evidence supports the conclusion that the telecommunications facility will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity, and the Hearing Examiner so finds.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: The proposed special exception use will not change the intensity of special exception uses in any substantial way. There are only two other special exception in the neighborhood; one is the adjacent Sprint tower and the other is an accessory apartment some distance away. Moreover, the proposed use is consistent with the 2006 Damascus Master Plan. The Hearing Examiner finds that the proposed special exception will not increase the number, scope, or intensity of special exception uses in a way that will affect the area adversely.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site. Moreover, the federal Telecommunications Act of 1996, 47 USC §332(c)(7)(B)(iv), provides that:

No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission's regulations concerning such emissions.

The report of Andrew Pak, an RF engineer (Exhibits 10 and 45(a)), indicates that the proposed facility will operate well within the FCC maximum standard.

Petitioners will also be required to comply with all applicable hazmat regulations governing the site. The Hearing Examiner therefore concludes that the proposed telecommunications facility will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: The evidence supports the conclusion that the proposed special exception would be adequately served by the specified public services and facilities, to the extent they are needed for this type of use.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*
- (B) *If the special exception does not require approval of a preliminary plan of subdivision, the Board of Appeals must determine the adequacy of public facilities when it considers the special exception application. The Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the Board must consider whether the available public

facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards. These standards include Local Area Transportation Review (“LATR”) and Policy Area Mobility Review (PAMR). As indicated in Part II. B. of this report, Technical Staff did do such a review, and concluded that the proposed use would add no additional trips during the peak-hour weekday periods. Thus, the requirements of the LATR and PAMR are satisfied without a traffic study. By its nature, the site requires no school, water or sewer services. Fire houses are nearby. Technical Staff concluded, as does the Hearing Examiner, that the instant petition meets all the applicable Growth Policy standards.

- (C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Based on the evidence of record, especially the Transportation Staff’s conclusion that the proposed use will have no adverse effect on area roadway conditions or pedestrians, the Hearing Examiner so finds. Exhibit 16, Attachment 9.

C. Specific Standards

The testimony and the exhibits of record, including the Technical Staff Report (Exhibit 16) and the conclusion of the Transmission Facilities Coordinating Group, provide sufficient evidence that the specific standards required by Section 59-G-2.58 are satisfied in this case, as described below.

Sec. 59-G-2.58. Telecommunication facility

(a) Any telecommunication facility must satisfy the following standards:

(1) *A support structure must be set back from the property line as follows:*

a. *In agricultural and residential zones, a distance of one foot from the property line for every foot of height of the support structure.*

b. *In commercial and industrial zones, a distance of one-half foot from property line for every foot of height of the support structure from a property line separating the subject site from commercial or industrial zoned properties, and one foot for every foot of height of the support structure from residential or agricultural zoned properties.*

c. *The setback from a property line is measured from the base of the support structure to the perimeter property line.*

d. *The Board of Appeals may reduce the setback requirement to not less than the building setback of the applicable zone if the applicant requests a reduction and evidence indicates that a support structure can be located on the property in a less visually obtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, if any, and visibility from the street.*

Conclusion: The proposed facility will have a 87 foot tall monopole tower. Subsection (a)(1) would require a 87 foot setback from the property line (one foot for every foot of tower height), as measured from the base of the monopole structure, in accordance with subsections (a)(1)a. and c.¹² The closest property line is located 205 feet away . Thus, the setback exceeds that required by Zoning Ordinance §§59-G-2.58(a)(1).

(2) *A support structure must be set back from any off-site dwelling as follows:*

a. *In agricultural and residential zones, a distance of 300 feet.*

b. *In all other zones, one foot for every foot in height.*

c. *The setback is measured from the base of the support structure to the base of the nearest off-site dwelling.*

d. *The Board of Appeals may reduce the setback requirement in the agricultural an[sic] residential zones to a distance of one foot from an off-site residential building for every foot of height of the support structure if the applicant requests a reduction and evidence indicates that a support structure can be located in a less visually obtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, and visibility from the street.*

Conclusion: The subject site is in a residential zone, so the 300 foot setback requirement applies.

¹² Subsection (a)(1)b is inapplicable because it applies only to commercial and industrial zones.

As shown in the Residential Setback Plan (Exhibit 29(b)), reproduced on pages 18-19 of this report, the closest off-site dwelling is 353 feet to the south. Thus, the proposal is in compliance with this requirement.

(3) *The support structure and antenna must not exceed 155 feet in height, unless it can be demonstrated that additional height up to 199 feet is needed for service, collocation, or public safety communication purposes. At the completion of construction, before the support structure may be used to transmit any signal, and before the final inspection, pursuant to the building permit, the applicant must certify to the Department of Permitting Services that the height and location of the support structure is in conformance with the height and location of the support structure, as authorized in the building permit.*

Conclusion: The support structure will be 80 feet in height, and the antenna will be mounted behind the faux foliage. The antenna will reach up to a height of approximately 85 feet, with faux branches extending to 87 feet. Thus, the proposal meets the requirement of being under 155 feet. A condition has been proposed in Part V of this report to insure compliance with the certification requirement.

(4) *The support structure must be sited to minimize its visual impact. The Board may require the support structure to be less visually obtrusive by use of screening, coloring, stealth design, or other visual mitigation options, after considering the height of the structure, topography, existing vegetation and environmental features, and adjoining and nearby residential properties. The support structure and any related equipment buildings or cabinets must be surrounded by landscaping or other screening options that provide a screen of at least 6 feet in height.*

Conclusion: The proposal conforms to this requirement, as outlined throughout this report. As previously mentioned, the proposed facility will be located in an area chosen by the applicants to reduce any visual impact upon the surrounding neighborhood. The monopole will be designed as a stealth treepole to help the use blend in with the natural surroundings of the tree stand in which it will be located. Photographic

simulations provided by the applicants indicate that the proposed tower will not have an unacceptable visual impact on the neighborhood.

(5) *The property owner must be an applicant for the special exception for each support structure. A modification of a telecommunications facility special exception is not required for a change to any use within the special exception area not directly related to the special exception grant. A support structure must be constructed to hold no less than 3 telecommunications carriers. The Board may approve a support structure holding less than 3 telecommunications carriers if: 1) requested by the applicant and a determination is made that collocation at the site is not essential to the public interest; and 2) the Board decides that construction of a lower support structure with fewer telecommunications carriers will promote community compatibility. The equipment compound must have sufficient area to accommodate equipment sheds or cabinets associated with the telecommunications facility for all the carriers.*

Conclusion: The property owner, Wesley Grove United Methodist Church, is a co-petitioner. The facility will be capable of supporting three telecommunications carriers.

(6) *No signs or illumination are permitted on the antennas or support structure unless required by the Federal Communications Commission, the Federal Aviation Administration, or the County.*

Conclusion: No signs or illumination are proposed, except the two square foot sign required by subsection (8), below, and a light on the equipment shelter to be used if emergency repairs are required at night.

(7) *Every freestanding support structure must be removed at the cost of the owner of the telecommunications facility when the telecommunications facility is no longer in use by any telecommunications carrier for more than 12 months.*

Conclusion: A condition requiring removal by Petitioners if the facility is not used for more than one year is recommended in Part V of this report.

(8) *All support structures must be identified by a sign no larger than 2 square feet affixed to the support structure or any equipment building. The*

sign must identify the owner and the maintenance service provider of the support structure or any attached antenna and provide the telephone number of a person to contact regarding the structure. The sign must be updated and the Board of Appeals notified within 10 days of any change in ownership.

Conclusion: The required sign will be installed, and a condition so stating is recommended in Part V of this report.

(9) *Outdoor storage of equipment or other items is prohibited.*

Conclusion: No outdoor storage of equipment is proposed. Equipment will be enclosed as described elsewhere in this report.

(10) *Each owner of the telecommunications facility is responsible for maintaining the telecommunications facility, in a safe condition.*

Conclusion: A condition to this effect is recommended in Part V below. Petitioners plan to service the facility on a monthly basis.

(11) *The applicants for the special exception must file with the Board of Appeals a recommendation from the Transmission Facility Coordinating Group regarding the telecommunications facility. The recommendation must be no more than one year old.*

Conclusion: A recommendation of approval, dated March 7, 2007, was filed herein as Exhibit 24. It was less than one year old when the petition was filed on June 19, 2007.

(12) *Prior to the Board granting any special exception for a telecommunications facility, the proposed facility must be reviewed by the County Transmission Facility Coordinating Group. The Board and Planning Board must make a separate, independent finding as to need and location of the facility.*

Conclusion: As noted, both the Transmission Facility Coordinating Group and the Planning Board recommended approval. The Technical Staff and the Hearing Examiner recommend that the Board make the finding that there is a need for the proposed

telecommunications facility and that it will be appropriately located, based on the evidence set forth in Part II of this report.

(b) Any telecommunications facility special exception application for which a public hearing was held before November 18, 2002 must be decided based on the standards in effect when the application was filed.

Conclusion: Not applicable.

(c) Any telecommunications facility constructed as of November 18, 2002 may continue as a conforming use.

Conclusion: Not applicable.

D. Additional Applicable Standards

Section 59-G-1.23. General development standards.

(a) Development Standards. Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.

Conclusion: This petition falls under the exception because Zoning Ordinance §59-G-2.58 specifies the development standards for telecommunications facilities. As discussed above, the proposed use meets those standards.

(b) Parking requirements. Special exceptions are subject to all relevant requirements of Article 59-E.

Conclusion: Technical Staff did not recommend any additional parking for the proposed facility because it will require only one service visit per quarter.

(c) Minimum frontage. In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:

* * *

(5) Public utility buildings and public utility structures,

including radio and T.V. broadcasting stations and telecommunication facilities.

Conclusion: No waiver is needed because the subject site has more than adequate frontage. In any event, the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21.

(d) Forest conservation. If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.

Conclusion: The project has an exemption (No. 4-07232E) from submitting a Forest Conservation Plan, according to Technical Staff.

(e) Water quality plan. If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.

Conclusion: This section pertains only to sites in special protection areas, where water quality plans are required. This site is not within an SPA.

(f) Signs. The display of a sign must comply with Article 59-F.

Conclusion: As indicated earlier in this report, the only sign on the facility will be the two square foot sign required by the special exception.

(g) Building compatibility in residential zones. Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.

Conclusion: The proposed monopole will be appropriately sited, scaled, disguised and landscaped to avoid impinging on the residential appearance of the neighborhood.

(h) Lighting in residential zones. All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:

(1) Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.

(2) Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.

Conclusion: As discussed elsewhere in this report, no lighting will be used on a regular basis. A light is planned for use only in the event of emergency nighttime repairs.

Section 59-G-1.26. Exterior appearance in residential zones.

A structure to be constructed, reconstructed or altered pursuant to a special exception in a residential zone must, whenever practicable, have the exterior appearance of a residential building of the type otherwise permitted and must have suitable landscaping, streetscaping, pedestrian circulation and screening consisting of planting or fencing whenever deemed necessary and to the extent required by the Board, the Hearing Examiner or the District Council. Noise mitigation measures must be provided as necessary.

Conclusion: It is not “practicable” to make an 87 foot tall monopole “have the exterior appearance of a residential building;” however, as mentioned above, it will be appropriately sited, scaled, disguised and landscaped to avoid impinging on the residential appearance of the neighborhood. Noise mitigation will not be needed.

Based on the testimony and evidence of record, I conclude that the telecommunications facility use proposed by Petitioners, as conditioned below, meets the specific and general requirements for the special exception, and that the Petition should be granted, subject to the conditions set forth in Part V of this report.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2706 for a special exception to construct and operate a telecommunications facility, including an 80-foot tall monopole, with stealth tree branches extending the overall height to 87 feet, and associated equipment, at 23630 Woodfield Road, Gaithersburg, Maryland, be GRANTED, with the following conditions:

1. The Petitioners shall be bound by all of the exhibits of record, and by the testimony of their witnesses and the representations of counsel identified in this report.
2. Petitioners must comply with the specifications on their site plan (Exhibit 29(a)).
3. Department of Permitting Services requirements, if any, for stormwater quality and quantity control must be fulfilled prior to issuance of any sediment and erosion control permits.
4. At the completion of construction, before the support structure may be used to transmit any signal, and before the final inspection pursuant to the building permit, the Petitioners must certify to the Department of Permitting Services that the height and location of the support structure is in conformance with the height and location of the support structure as authorized in the building permit.
5. The telecommunication facility must display a contact information sign, no larger than two square feet, affixed to the outside of the equipment enclosure. This sign must identify the owner and the maintenance service provider and provide the telephone number of a person to contact regarding the installation. The sign must be updated and the Board of Appeals notified within 10 days of any change in ownership.
6. There must be no antenna lights or stroboscopic lights unless required by the Federal Communications Commission, the Federal Aviation Administration, or the County.
7. There must be no outdoor storage of equipment.

8. Each owner of the telecommunications facility is responsible for maintaining the facility in a safe condition.
9. The facility shall be available for co-location of up to three carriers.
10. The telecommunications facility must be removed at the cost of the owner of the telecommunications facility when the facility is no longer in use by any telecommunications carrier for more than 12 months.
11. Petitioners must obtain a Hazmat Use Permit for the subject site before commencing operations.
12. Petitioners must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioners shall at all times ensure that the special exception use and the entire premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: March 30, 2009

Respectfully submitted,

Martin L. Grossman
Hearing Examiner